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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002340-MR

RUSSELL MOORE AND
TIERNI MOORE

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 06-CI-01935

SAINT JOSEPH HEALTHCARE, INC.
D/B/A SAINT JOSEPH HOSPITAL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO, THOMPSON, AND WINE, JUDGES.

STUMBO, JUDGE: Russell Moore and Tierni Moore appeal from an Opinion and Order of the Fayette Circuit Court granting Summary Judgment in favor of Saint Joseph Healthcare, Inc., d/b/a/ Saint Joseph Hospital. The Moores filed the instant

action against Saint Joseph alleging that it was negligent in failing to obtain the informed consent of Mr. Moore before giving him a thrombin injection, and that Mrs. Moore suffered a loss of consortium resulting from the alleged negligence. The Moores contend that the circuit court erred in granting Saint Joseph's motion for Summary Judgment because KRS Chapter 304 required Saint Joseph to obtain Mr. Moore's consent prior to administering the thrombin injection, and because genuine issues of material fact on that issue remain for adjudication. We are persuaded by the circuit court's determination that Saint Joseph was not required to obtain Mr. Moore's written consent because no Saint Joseph employee treated Mr. Moore, and because his consent to an ultrasound compression procedure included his consent to a thrombin injection. Accordingly, we affirm the Opinion and Order on appeal.

On May 10, 2005, Mr. Moore traveled to Pattie A. Clay Hospital in Richmond, Kentucky after experiencing chest pain. An examination of Mr. Moore revealed that he needed to undergo an angiogram procedure, which was conducted the following day at Saint Joseph by Dr. Ananth Kumar. Dr. Kumar then performed an angioplasty and inserted a stent to correct a coronary blockage.

After the angioplasty was completed, Dr. Kumar used a vascular closure device called an Angioseal to repair Mr. Moore's femoral artery. Mr. Moore developed complications with the femoral artery closure, and was evaluated by vascular surgeons, Dr. Karen Draper and Dr. Hancock,¹ who recommended an

¹ A search of the record does not reveal Dr. Hancock's first name.

ultrasound compression procedure. After consulting with the doctors, Mr. Moore signed a consent form on May 18, 2005, permitting Dr. George Smith to perform the procedure.

Dr. Smith performed the ultrasound compression procedure, which did not resolve the complication with Mr. Moore's femoral artery. After determining that the procedure had not been effective, Dr. Smith administered a thrombin injection. Subsequent to Mr. Moore receiving the injection, the medical staff was unable to locate a pulse in his right foot. After Mr. Moore's written consent was obtained, Drs. Draper and Hancock then performed a superficial femoral artery thromboembolectomy.

On May 4, 2006, the Moores filed the instant action in Fayette Circuit Court against Dr. Smith, his employer New Lexington Clinic and Saint Joseph. Mr. Moore alleged that the defendants improperly failed to obtain his consent to the thrombin injection and that their actions constituted negligence proximately resulting in permanent injury, the inability to earn money in the future, and pain and suffering. Mrs. Moore alleged a loss of consortium.

The matter proceeded in Fayette Circuit Court, and Saint Joseph tendered a motion for Summary Judgment on June 27, 2008. As a basis for the motion, Saint Joseph maintained that Mr. Moore's claim should be properly characterized as one alleging battery, and that no battery was committed because there was no unlawful touching; that it had no duty to obtain Mr. Moore's written consent for the thrombin injection because that duty rested, if at all, with the

treating physicians and not hospital staff; and, that even if Saint Joseph had a duty to obtain the consent, Mr. Moore did consent to the thrombin injection as part of his consent to the ultrasound compression.

A hearing on the motion was conducted on October 10, 2008, and the Circuit Court rendered an Opinion and Order on November 12, 2008, sustaining the motion for Summary Judgment. The court determined in relevant part that Saint Joseph had no duty to obtain Mr. Moore's informed consent because no person employed by Saint Joseph treated Mr. Moore. It further found that even if Saint Joseph had a duty to obtain his consent, Mr. Moore discussed with the treating physician the possibility of a thrombin injection being required if the ultrasound compression failed to resolve his femoral artery problem, and that his consent to the ultrasound compression constituted consent to the thrombin injection. This appeal followed.

The Moores now argue that the circuit court erred in sustaining Saint Joseph's motion for Summary Judgment. They maintain that KRS 304.40-320 and 304.40-260 required Saint Joseph to obtain Mr. Moore's informed consent prior to the thrombin injection procedure, and that even without the application of those statutes, Saint Joseph took it upon itself to obtain informed consent thereby creating its own duty. The Moores contend that, in either event, Saint Joseph had a duty to obtain Mr. Moore's informed consent and that facts are contained in the record precluding the entry of Summary Judgment. They note, for example, that it is undisputed that the informed consent document signed by Mr. Moore did not

address a thrombin injection, but that the injection was administered nevertheless. In sum, they seek an Order reversing the Summary Judgment on appeal and remanding the matter for further adjudication.

We have closely examined the written arguments, the record and the law, and find no error in the entry of Summary Judgment. The Moores direct our attention to KRS 304.40-320 and 304.40-260. KRS 304.40-320 states,

In any action brought for treating, examining, or operating on a claimant wherein the claimant's informed consent is an element, the claimant's informed consent shall be deemed to have been given where:

(1) The action of the health care provider in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with the accepted standard of medical or dental practice among members of the profession with similar training and experience; and

(2) A reasonable individual, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedure and medically or dentally acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other health care providers who perform similar treatments or procedures;

(3) In an emergency situation where consent of the patient cannot reasonably be obtained before providing health care services, there is no requirement that a health care provider obtain a previous consent.

KRS 304.40-260 states,

(1) "Health care provider" means any physician, osteopath, dentist, podiatrist, nurse or nurse's assistant, certified registered nurse anesthetist, physical or occupational therapist, or psychologist, licensed to

practice health care in this state; any hospital, medical clinic, medical foundation, health maintenance organization, extended care facility, intermediate care facility, nursing home, emergency treatment center, outpatient medical or surgical center, frontier nursing service, or any other facility or service licensed under any act of this state to provide health care within this state; or any officer, director, employer agent thereof; and any corporation, partnership or sole proprietorship which directly provides medical services to its employees; . . .

(7) “Health care” means any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider to a patient during that patient’s care, treatment, or confinement for a physical or mental condition; . . .

The Moores rely on these statutes in support of their argument that a hospital has a duty to obtain the informed consent of its patients prior to allowing medical procedures to be performed on them. They maintain that such a duty is owed by health care providers, and that the statutory definition of a health care provider includes “any hospital . . . or any other facility or service licensed under any act of this state to provide health care within this state.” In support of this argument, they direct our attention to *Keel v. St. Elizabeth Medical Center*, 842 S.W.2d 860 (Ky. 1992).

The Moores characterize the central issue as whether the Fayette Circuit Court properly determined that Saint Joseph did not owe a duty to Mr. Moore to obtain his informed consent to the thrombin injection. We need not reach that issue, because irrespective of whether Saint Joseph owed such a duty, the record reveals that Mr. Moore was informed that the thrombin injection would

be required if the ultrasound compression was unsuccessful and that he consented to the injection. Mr. Moore stated in deposition that after the angiogram was conducted, the treating physicians advised him that he had developed a pseudoaneurysm and fistula which could be treated with ultrasound compression. He was also informed that if the ultrasound compression was not successful, a thrombin injection would be required. The risks of both procedures were explained to him, after which he consented in writing to the ultrasound compression. Based on his deposition, we may properly characterize Mr. Moore's written consent to the ultrasound compression as encompassing his consent to the thrombin injection. The exchange between counsel for Saint Joseph and Mr. Moore in deposition was as follows:

Q: Did they tell you anything about alternatives to doing [ultrasound compression]?

A: Well, I asked "What happens if that doesn't work?"

Q: And what did they say?

A: They said that then they could inject -- perhaps have an injection of thrombin.

Q: Tell me about that discussion.

A: And I said, "Thrombin?" Thrombin is a blood clotting agent. I said "What? You know, you want to inject thrombin in my artery?" And I asked [Dr. Draper] about pulmonary edema -- or pulmonary emboli, and she said "Well, there's risks with any procedure you do." Okay. They didn't specify any risks that were specific. "There's a procedure -- or risk to any procedure you do, and if it gets in the arterial system, it's going to go in your" foot. You don't have to worry about it." ***So I said "Okay."*** (Emphasis added).

Q: You said “Okay” to that?

A: (Indicating).

Q: I’m sorry?

A: Yes, I’m sorry. Thank you.

We find no error in Fayette Circuit Court’s determination that Mr. Moore was informed that a thrombin injection would be required if the ultrasound compression did not resolve the pseudoaneurysm and fistula, that he was made aware that risks were associated with the procedure, and that his written consent to the ultrasound compression included his consent to the thrombin injection. This is especially true when Mr. Moore’s express acknowledgement of his consent is considered in the broader context of his entire deposition testimony, wherein he further acknowledges understanding that the ultrasound compression procedure was the preferred course of action, followed by the thrombin injection, followed by surgery if the thrombin injection did not resolve the pseudoaneurysm and fistula. And though by no means dispositive, it is worth noting that Mr. Moore did not express surprise upon learning that he had received the thrombin injection, and in fact did not raise the issue until weeks later. When Mr. Moore’s deposition testimony is considered in light of the entire record, we find no error in the circuit court’s determination that Mr. Moore provided informed consent to the thrombin injection. This conclusion comports with KRS 304.40-320(2), which states that informed consent is deemed to have been given where a “reasonable individual, from the information provided by the health care provider under the circumstances,

would have a general understanding of the procedure and medically . . . acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment or procedures. . . .” We find as moot Saint Joseph’s argument that the Moores’ cause of action should be grounded in battery rather than negligence.

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. “The 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.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to the Moores and resolving all doubts in their favor, we must nevertheless conclude that no genuine issue of material fact remains for adjudication and that Saint Joseph is entitled to Summary Judgment as a matter of law. For the foregoing reasons, we affirm the

Opinion and Order of the Fayette Circuit Court sustaining Saint Joseph's motion
for Summary Judgment.

ALL CONCUR.

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