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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000734-MR

ROSETTA BAKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 09-CI-001981

MEMORIAL HEALTHCARE SYSTEM,
INC.; D/B/A NAZARETH HOME

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

ACREE, CHIEF JUDGE: Rosetta Baker appeals from the December 15, 2011, order of the Jefferson Circuit Court granting summary judgment to Sisters of Charity of Nazareth, Inc. (“Nazareth Home”) in a medical malpractice action filed

by Baker. Because we hold that the trial court incorrectly found that Baker could not prove causation, we reverse.

In February of 2008, Baker underwent surgery for a total right knee replacement. As part of her prescribed rehabilitation, Baker was discharged to Nazareth Home. During her residency at Nazareth Home, Baker requested assistance to stand and get into her bed. Baker contends that as she was attempting to stand, the nursing staff failed to assist her and she consequently fell. Baker testified that upon falling she heard a popping sound and felt intense pain in her ankle. Thereafter, Baker was diagnosed with a fracture in her distal fibula, or ankle.

Baker filed a negligence action against Nazareth Home on February 25, 2009. In her complaint, she alleged that the negligence of Nazareth Home's staff had resulted in her ankle fracture. Following the deposition of Baker's two expert witnesses, Nazareth Home moved for summary judgment based on the contention that Baker could not provide an expert who would testify as to the causation of her injuries. The trial court agreed, and on December 12, 2011, granted Nazareth Home's motion for summary judgment. Baker filed a motion to reconsider which was subsequently denied. This appeal followed.

Our review of a trial court's grant of 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.

Kentucky Rules of Civil Procedure (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). Summary judgment “is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Id.*

“It is beyond dispute that causation is a necessary element of proof in any negligence case.” *Baylis v. Lourdes Hosp., Inc.*, 805 S.W.2d 122, 124 (Ky.1991). “[I]n 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.” *Rogers v. Integrity Healthcare Services, Inc.*, 358 S.W.3d 507, 511-12 (Ky. App. 2012) (citation omitted). Therefore, in order to overcome a motion for summary judgment, the plaintiff must produce expert medical evidence. *Id.* Moreover, evidence of causation must be in terms of probability rather than mere possibility. *Baylis*, 805 S.W.2d at 124.

The two witnesses presented by Baker as medical experts were Dr. Gary Bloemer and registered nurse Nancy Dion. Baker argues that Dr. Bloemer’s testimony created a genuine issue of material fact which would make summary judgment improper. After a thorough review of the parties’ arguments and the record, we agree.

In order to best illustrate the testimony with which the trial court was presented, we provide the following relevant excerpts from Dr. Bloemer's deposition:

Q. And I believe I understood your testimony that these types of stress fractures or distal fibula fractures are mostly associated with injuries of some kind for this type of aged patient?

A. Yes.

Q. And the mechanism of injury described in your March 7, 2008, note – that is that Ms. Baker slipped off a leg rest while getting up, is that the type of incident that is consistent with this type of fracture?

A. Yes, it is.

Q. So based upon that, Doctor, would it be fair for me to say or fair for you to say within a reasonable degree of medical probability that the distal fibula fracture, at least by history, was a result of that incident at Nazareth Home?

A. Yes. I would say that the description the patient gave and the findings of the fracture are consistent.

.....

Q. Okay. You talked about sometimes fractures happen with the absence of negligence. Sometimes they happen because of negligence, as well?

A. They can, yes. They can happen from anything. And I'm not here to comment the patient said her leg slipped off the recliner – is that negligent or is that just an accident? That's not for me to decide, obviously.

.....

Q. Dr. Bloemer, do you understand the term "reasonable degree of medical probability?"

A. Yes.

Q. And what does that mean to you?

A. That means that it's more likely than not for whatever condition, yes.

Q. And Mr. Sampson asked you some questions about whether plaintiff's report of falling or slipping or whatever would be consistent with the type of fracture she sustained, correct?

A. Yes.

Q. And that's – your answer was affirmative that it would be?

A. Yes. It – yes. It was consistent with – the X-ray findings were consistent with what she described.

Q. But without reviewing any of the depositions in this case or Nazareth Home record in this case, you're not here to say that that fracture is what – or any type of fall caused it in this case, within a reasonable degree of medical probability?

A. Correct. Because I don't know what caused it. And I hear this all the time from attorneys. I just treat the problem as it comes. I don't know what happened. You know, Ms. Baker could have went out to dinner the night before and fell at a restaurant and did it. Or it could be what she described was certainly consistent with it. It could be from anything. I wasn't there to witness the injury or anything else.

(Deposition of Dr. Bloemer, pp. 50-54).

In support of its grant of summary judgment, the trial court found that Dr. Bloemer's deposition "clearly refutes" any argument that any action by Nazareth Home was the probable cause of Baker's injuries. We disagree.

It appears that the trial court has mistaken Dr. Bloemer's refusal to submit an opinion as to negligence as a refusal to submit an opinion as to causation. Dr. Bloemer's testimony is clear that Baker's description of the events

which led to her injury was consistent with his medical findings, making it likely that the injury was a result of Baker's fall. He stated explicitly that there is a reasonable degree of medical certainty that Baker's fall caused her injury. This testimony sufficiently serves as an "aid" to the jury in its determination of causation, and Baker's burden of creating a genuine issue of material fact regarding causation has been met. *See Rogers*, 358 S.W.3d 507.

Although Dr. Bloemer stated that he was not a witness, and therefore could not know the cause of Baker's injury with complete certainty, such first-hand testimony is unnecessary. Dr. Bloemer is frank that he has no opinion with regard to the ultimate issue of Nazareth Home's purported negligence, but gives a clear opinion as to causation: within a reasonable degree of medical certainty, Baker's fall could have caused her injury. Therefore, it is possible, given Baker's account of the story combined with Dr. Bloemer's testimony regarding causation, that a jury could find in Baker's favor. *See Steelvest*, 807 S.W.2d 476.

Accordingly, summary judgment for failure to provide medical testimony as to causation was improper. We note, however, that our opinion does not resolve the merits of Baker's claim against Nazareth Home. We simply hold that a genuine issue regarding causation remains, eliminating the basis for the summary judgment.

For the foregoing reasons, the December 15, 2011, order of the Jefferson Circuit Court is reversed and this matter remanded for further proceedings.

ALL CONCUR.

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