

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001178-MR

CHAROLETTE CLARK, AS PARENT
AND LEGAL GUARDIAN OF
JEREKEITHIA D. CLARK

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 10-CI-005972

THOMAS KNABEL AND
SHERI SONS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Charolette Clark, as Parent and Legal Guardian of Jerekeithia D. Clark, has appealed from the Jefferson Circuit Court's May 16, 2012, summary judgment dismissing her personal injury claims against Thomas Knabel and Sheri Sons (hereinafter, collectively, "defendants" or "appellees"), as

well as from the June 25, 2012, order denying her motion to alter, amend, or vacate the prior order. We have carefully reviewed the record and the parties' arguments, and finding no error, we affirm the judgment on appeal.

Jerekeithia D. Clark (hereinafter "Kita") is Clark's adult daughter, who was born on March 3, 1990. Kita suffers from mental retardation, epilepsy, Cerebral Palsy, Autism, and Angelman's Syndrome, which is a neuro-genetic disorder that is characterized by developmental delay, seizures, jerky movements, speech impairment, and movement and balance disorder. One disability-related characteristic Kita has is that she frequently places foreign objects into her mouth. Because of her disabilities, Kita requires 100% supervision and special education. Clark enrolled Kita in Churchill Park School in the Functional Mental Disabilities Program when she was six or seven years old. She began her twelfth year with the school in August 2009 at the age of nineteen. Thomas Knabel is the Principal of Churchill Park School and Shari Sons is a teacher at the school. Sons was Kita's teacher during that school year.

In the early months of 2010, during a time when she was still enrolled at Churchill Park School, Kita ingested a plastic glove. When Clark got Kita off of the school bus after school on February 19, 2010, she noticed that Kita was crying and not feeling well. Kita refused to eat, drink, or take her medicine, which was causing her to become dehydrated, and Clark noticed blood in her vomit. Clark took Kita to Norton Hospitals, Inc., d/b/a Kosair Children's Hospital (hereinafter "Kosair") on February 22, 2010, where she was diagnosed with the flu,

pneumonia, and dehydration, hospitalized for seven days, and discharged on March 1, 2010. Clark took Kita back to Kosair on March 4, 2010, and she was again admitted. On March 10, 2010, the medical staff performed a procedure to determine the source of Kita's problems. During this procedure, a physician discovered a plastic glove in Kita's stomach. Another physician surgically removed the glove. Once the glove had been removed, Kita's health improved, and she resumed eating, drinking, and taking her medication. She was discharged on March 13, 2010, and received follow-up medical care following her discharge. Clark withdrew Kita from Churchill Park School shortly thereafter.

The staff at Churchill Park School used plastic gloves to care for the students, including when their diapers were changed. Because of this, Clark believed that Kita had ingested the glove at the school and that the staff had failed to properly supervise and care for Kita, which allowed her to put the glove in her mouth and swallow it, incurring a personal injury.

On August 24, 2010, Clark, as Kita's parent and legal guardian, filed a complaint against Knabel, Sons, and multiple unknown defendants, alleging that the defendants were under an affirmative duty to take all reasonable steps to prevent foreseeable harm to Kita while she was under their supervision and to exercise reasonable care in their care and supervision of Kita while at the school. Because of their failure to do so, Kita was able to place the plastic glove in her mouth and swallow it while under their supervision and care. Clark demanded

compensatory damages, punitive damages, interest, attorney fees and costs, and a trial by jury.

The defendants filed an answer to Clark's complaint, generally denying the allegations in the complaint. They also presented several affirmative defenses, including that the complaint failed to state a claim upon which relief could be granted, the injuries were caused by intervening and superseding actions beyond the control or responsibility of the defendants, the actions alleged by Clark were not the proximate cause of the injuries, and Clark's claims were barred by immunity. The defendants also stated that Clark's claim for punitive damages was barred.

In February 2011, based upon discovery findings that another entity might be liable for Kita's injuries, Clark moved to file an amended complaint to name Kosair as a defendant. The circuit court granted the motion, and the amended complaint was filed on February 17, 2011. In the amended complaint, Clark alleged that Kita had been a patient at Kosair from February 22, 2010, through March 1, 2010, and from March 4, 2010, to March 10, 2010, during which times she was owed a duty of care to be provided with supervision and care by its employees. Clark stated that the Kosair staff was aware of Kita's disabilities and special needs and that the staff used plastic gloves to care for patients in the hospital, including Kita. Clark alleged that through its employees or agents, Kosair was negligent in failing to provide her with supervision and with medical and/or nursing care. In its answer, Kosair raised several affirmative defenses, including

the statute of limitations, that any injuries or damages may have arisen due to her own negligence or actions, and another person or party might have caused the injuries. Like the defendants, Kosair argued that Clark could not maintain a claim for punitive damages for various reasons.

The circuit court scheduled a jury trial for May 29, 2012, and included several pretrial deadlines related to the identification of expert witnesses to be called at trial and for any pretrial motions. In March 2012, the defendants filed their expert disclosure, stating that they reserved the right to elicit testimony from the physicians who treated Kita pursuant to Kentucky Rules of Evidence (KRE) 702. Clark then filed notices that she intended to depose Chad A. Wiesenauer, M.D., on April 30, 2012, and Marlye R. Hill-Ali, M.D., on May 1, 2012.

The defendants and Kosair filed respective motions for summary judgment at the end of March 2012. Both parties argued that Clark had failed to establish a *prima facie* case of negligence; Kosair argued that there was no evidence that its employees failed to properly supervise, care for, or treat Kita or allowed her to ingest the latex glove, while the defendants argued that Clark had not established that Kita ingested the glove while she was at school and that they were entitled to qualified official immunity, shielding them from Clark's negligence claims. In written discovery, Clark had conceded that she was unaware of where Kita had ingested the glove.

On April 6, 2012, Clark filed notices to take the video depositions of Thomas Stephen, M.D., Emily Tan, M.D., Robert P. Dillard, M.D., and Dr.

Wiesenauer¹ relating to their care and treatment of Kita. The depositions were to take place between April 26 and May 11, 2012. By order entered April 18, 2012, on the defendants' motion, the circuit court rescheduled the May trial date until July 24, 2012. The court entered a second trial order confirming the new trial date and ordering the parties to exchange witness lists and make documentary evidence available for inspection at least thirty days before trial. Depositions were to be completed at least fourteen days before trial, including depositions of expert witnesses.

Clark filed a response to the defendants' motion for summary judgment, but informed the court that she did not intend to respond to Kosair's motion for summary judgment. In her response, Clark argued that there was evidence in the record that Kita ingested the glove on February 19, 2010, while under the defendants' supervision. Clark asserted that there were genuine issues of material fact related to whether Kita swallowed the glove at Churchill Park School, arguing that there was "significant evidence in the record" that Kita had swallowed the glove at school when she was under the defendants' care and supervision, while there was no evidence that she swallowed a glove she found elsewhere. Clark pointed out that Kita would have had access to the glove because the staff at Churchill Park School used gloves on a regular basis to care for the children under their care. Essentially, Clark's argument rested on her observation that Kita was fine when she went to school on the morning of February 19, 2010, but was in

¹ Kosair took Dr. Wiesenauer's deposition on September 13, 2011.

distress and sick when she returned that afternoon. She also argued that the defendants' acts were ministerial in nature, not discretionary, so that they would not be entitled to qualified official immunity.

On April 18, 2012, the same day she filed her response to the defendants' motion for summary judgment, Clark canceled the video depositions of Dr. Stephen, Dr. Hill-Ali, Dr. Tan, Dr. Dillard, and Dr. Wiesenauer. She did not indicate in her response to the motion for summary judgment what these physicians would have testified to.

In their reply, the defendants argued that Clark failed to meet her burden by presenting some evidence showing that there was a genuine issue of material fact for trial. She did not identify any witnesses who observed Kita ingest the glove at Churchill Park School; she did not establish a link between the glove and the school, noting that Dr. Wiesenauer could not testify how long the object had been in Kita's stomach or the original color the glove had been because Kosair had destroyed the glove; and she did not establish a link between Kita's symptoms and her ingestion of the glove, noting that the only evidence regarding her medical condition was her diagnosis of the flu, pneumonia, and dehydration.

On May 16, 2012, the circuit court entered an opinion and order granting both motions for summary judgment and dismissing Clark's claims. The court held that Clark was not able to prove that either the defendants or Kosair breached their respective duties, stating:

Plaintiff posits that Jerekeithia must have ingested the glove at either Churchill or Kosair. Yet while Plaintiff is entitled to plead alternative theories of her case, she must come forth with some evidence that a party breached its duty to defeat a summary judgment motion. Plaintiff has failed to come forth with any such evidence.

Regarding the defendants' supervision, the circuit court stated:

Similarly, Plaintiff has failed to raise a dispute of material fact in regard to Knabel and Sons' supervision of Jerekeithia. Plaintiff can only hypothesize that Jerekeithia ingested the glove at school on February 19, 2010, because she was ill on that day. The evidence supports Jerekeithia's illness. Indeed, she was hospitalized and diagnosed with pneumonia. However, she was discharged upon her improvement. Only after being admitted on a separate visit, well after Jerekeithia's last day at school, was the glove discovered. Plaintiff has not established with any evidence that Jerekeithia ingested the glove on February 19, 2010, and not in the intervening days before or after her initial hospitalization. Simply because gloves were utilized at Churchill is not evidence that Jerekeithia obtained the glove at school. Jerekeithia may have ingested the glove at a number of locations such as her primary care doctor's office, or she may have found the glove lying on the ground in some unknown location. Without some evidence as to when the glove was ingested, Plaintiff cannot prove Jerekeithia ingested it at school. Moreover, it is unknown whether the offending glove was even a latex glove of the type utilized at Churchill. Dr. Wiesenauer could not identify its color or material.

Finally, the Court noted that Clark had not presented any expert testimony regarding "the probable symptoms that would manifest for ingesting a foreign object." The court did not believe that a lay juror was capable "of judging whether the glove could reasonably have been consumed several weeks prior to its removal or whether it could only have existed in Jerekeithia's stomach for a matter of hours

to days.” The court concluded that Clark had failed to “come forth with some evidence, beyond mere speculation, that the glove was in fact ingested at or obtained from Churchill several weeks prior to its discovery.” The court did not address the defendants’ qualified official immunity argument.

Clark filed a motion to alter, amend, or vacate its order granting summary judgment and dismissing her suit against the defendants pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. She argued that there were genuine issues of material fact to be decided, noting that the defendants had not provided any evidence to support their theory that Kita could have swallowed the glove somewhere other than Churchill Park School. Clark also argued that she did not need expert medical testimony to prove her negligence claims against the defendants because lay jurors would be able to use their own common sense to determine whether they had negligently supervised Kita and allowed her to swallow the glove. Clark disagreed with the circuit court’s ruling that a lay juror would be unable to judge how long the glove had been in Kita’s stomach. In their response, the defendants once again pointed out that Clark’s belief that Kita ingested the glove at school was not sufficient to constitute evidence to allow her to withstand a motion for summary judgment. Furthermore, Kita would have had access to gloves during her two stays at Kosair. Finally, the defendants disputed Clark’s *res ipsa loquitur*-type argument that expert testimony regarding the symptoms for ingesting a foreign body was irrelevant.

The court held a hearing on Clark's motion on June 18, 2012. Clark discussed various evidentiary matters that she contended created material issues of fact. She stated that gloves were used at the school on a daily basis, and she questioned how the gloves were stored and disposed of, noting that they were located on an open metal shelf next to the diaper stations and were disposed of next to the changing station in garbage cans. Kita had access to gloves only at the school, but not at any of the other locations the defendants had raised. Clark, who was with her daughter 100% of time Kita was not in school, testified in her deposition that Kita did not have access to or opportunity to swallow a glove anywhere else. By pointing to other locations where Kita could have obtained the glove, the defendants were injecting genuine issues of material fact regarding where she got the glove. Therefore, this was an issue for the jury to decide. Clark also argued that she did not need expert testimony to prove her case because there was no dispute that Kita had swallowed the glove and had been experiencing symptoms since she came home from school on February 19, 2010. Rather, the jury could have determined this without any expert testimony. Access and availability were the key issues, Clark argued, which did not need expert testimony to support. Clark also noted that at the time the motions for summary judgment were filed, she had depositions scheduled for Kita's treating physicians, which were subsequently canceled because of the change in the trial date. Had those depositions been held, Clark would have been able to obtain testimony regarding Kita's symptoms and her ingestion of the glove. Finally, Clark briefly mentioned

the qualified official immunity issue, which the court had not addressed in its order.

In response, the defendants argued that there was no manifest error in the court's original ruling. The defendants asserted that Clark was uncertain enough about where Kita had ingested the glove that she amended her complaint to name Kosair as another defendant. Clark's mere belief that Kita had ingested the glove at the school was not enough. The only medical evidence in the record was her diagnosis of flu and pneumonia upon her admission to Kosair; there must be expert evidence for proof that her symptoms were actually related to her ingestion of the glove. Also, Dr. Wiesenauer, who removed the item from Kita's stomach, testified that he thought the item was a glove, but was unable to describe it any further or state whether it was a medical glove or a household one. Finally, the defendants pointed out that Clark had the burden of proving Kita obtained the glove at school, but that she was only able to state her belief without any supporting proof.

In reply, Clark addressed her amendment of the complaint to add Kosair; that defendant was only added based upon the defendants' response to a discovery request stating that Kita could have obtained the glove at Kosair. However, the evidence taken after that time established that Kita could not have done so. Clark also continued to argue that the jury did not need any expert testimony to link Kita's symptoms to her ingestion of the glove, similar to cases where a foreign object is found in an abdomen. She believed that she had proven her case by establishing that school personnel used gloves on a daily basis and that Clark told

Dr. Wiesenauer that she had no doubt that the glove had been ingested at school. There was no evidence to establish that it had happened anywhere else. The defendants then countered this new argument expressed by Clark, which they described as akin to *res ipsa loquitur*. A fundamental element of this doctrine is that the defendant has the sole control over the instrumentality that injured the plaintiff. Here, there was no evidence that Churchill Park School had sole control over the gloves; the gloves were obtainable other places as well. In response to this argument, Clark contended that the jury should be permitted to hear testimony disputing that Kita could have obtained the glove anywhere else, including Kosair or her doctor's office or the grocery store.

The court denied Clark's motion in an opinion and order entered June 25, 2012. In denying the motion, the court stated that Clark had not presented expert testimony to describe the symptoms associated with ingesting a foreign body, meaning that she could not establish when the glove was swallowed or if Kita's symptoms were consistent with swallowing the glove or with her diagnoses. The court specifically stated that Clark needed expert testimony to establish when the glove could have been ingested and reiterated that a lay juror could not make this determination without the aid of expert testimony. Had there been no dispute that Kita had ingested the glove at school, the court pointed out that there would not have been any need for expert testimony. But the issue here was where and when Kita obtained the glove. The court also stated that it was not the defendants' burden to prove that the glove was ingested elsewhere; rather, the burden was on

Clark to establish that it was ingested at the school, which she failed to do. Clark's belief was not enough to meet that burden. Accordingly, the circuit court denied the motion. This appeal now follows.

On appeal, Clark argues that the circuit court erred in concluding that she failed to produce evidence of genuine issues of material fact related to whether Kita swallowed the glove while under the defendants' (now "appellees") supervision. She also argues that the circuit court improperly dismissed her suit because she failed to disclose an expert medical witness. In response, the appellees contend that the circuit court properly concluded that Clark failed to present evidence that they had breached their duty, that Clark's theories to circumvent the lack of evidence are without merit, and that Clark cannot save herself from summary judgment by stating that she intended to call Kita's treating physicians related to her symptoms. Finally, the appellees argue that they are entitled to qualified official immunity against Clark's claims.

Our standard of review is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for 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.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "Because summary judgment involves only legal questions

and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.” *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). Clark contends that there are disputed issues of material fact, while the appellees argue otherwise.

As the appellees point out, Clark, as the plaintiff, is required to establish a *prima facie* case of negligence. In *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003), the Supreme Court of Kentucky explained that a negligence case “requires proof that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the standard by which his or her duty is measured, and (3) consequent injury.” *Id.* at 88, citing *Mullins v. Commonwealth Life Insurance Co.*, Ky., 839 S.W.2d 245, 247 (Ky. 1992). The Court went on to define “consequent injury” as “actual injury or harm to the plaintiff and legal causation between the defendant's breach and the plaintiff's injury.” *Id.* at 89 (citations omitted). While duty is a question of law, the elements of breach and injury are questions of fact, which are decided by a jury. *Id.* Causation represents a mixed question of both law and fact. *Id.* In terms of summary judgment,

[T]o be entitled to judgment as a matter of law, [a defendant] must show that (1) it was impossible for [the plaintiff] to produce any evidence in her favor on one or more of the issues of fact; (2) under the undisputed facts of the case, it owed no duty to [the plaintiff]; or (3) as a

matter of law, any breach of a duty it owed to [the plaintiff] was not a legal cause of her injuries.

Id. (internal citations omitted). The question in this case is whether there is evidence to establish that the appellees breached their duty of care.

In order to establish this element, Clark must prove when, where, or how Kita ingested the glove, and we must agree with the appellees that there is a total lack of proof on this necessary element. Clark's case hinges on her belief that Kita obtained and ingested the glove at Churchill Park School because she believed that Kita could not have obtained it anywhere else. Clark posits that because the appellees argued that there were other locations where Kita might have obtained the glove, such as at Kosair or her doctor's office or the grocery store, this created an issue of fact for the jury to decide. We must disagree with this argument.

“The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment.” *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001) (citation omitted). And “[b]elief” is not evidence and does not create an issue of material fact. A plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment.” *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Here, Clark's case is entirely built on her belief; she did not identify any witness who saw Kita ingest the glove at Churchill Park School or who saw either appellee handle gloves inappropriately or who would testify that

the school's policy related to the handling of gloves was inappropriate or had been violated. Furthermore, Clark could not rely upon the testimony of Dr. Wiesenauer to link the glove he removed from Kita's stomach back to her school. He could not state how long the object had been in Kita's stomach, what its original color was, or whether it was even a medical glove. Because Kosair destroyed the glove, there was no way to trace its origin to a specific location.

At the hearing on the motion to alter, amend, or vacate, Clark contended that she planned to elicit testimony from Kita's treating physicians regarding her symptoms and whether those could have been from the ingestion of the glove. However, the record is devoid of any of this information, and Clark offered no explanation for her cancellation of the depositions other than that the trial date had changed and she wanted to take the depositions closer to trial. While their testimony might have shed some light on the question of how long the glove had been in Kita's stomach and other issues, there is nothing in the record to establish what this testimony might have been or to counter the medical evidence in the record that Kita had been diagnosed with the flu, pneumonia, and dehydration during her first stay at Kosair. On a related note, we also agree with the circuit court and the appellees that Clark needed expert testimony regarding the symptoms that would manifest when a person ingests a foreign object; this is certainly beyond the knowledge of a lay juror.

“The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary

judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted). Here, Clark failed in her burden to present any affirmative evidence to overcome the appellees’ motions. Rather, Clark’s arguments entirely rest on her belief alone.

We also must reject Clark’s *res ipsa loquitur* argument and her reliance upon *Perkins v. Hausladen*, 828 S.W.2d 652 (Ky. 1992). *Perkins* is a medical malpractice case in which our Supreme Court addressed the doctrine of *res ipsa loquitur* in relation to the need for expert medical testimony to establish a breach of duty.

The *Restatement (Second) of Torts* covers *res ipsa loquitur* in Section 328D. Several of the observations in the Restatement are pertinent here. On dispelling its mystery, the *Restatement* states:

“A *res ipsa loquitur* case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it.” Comment b, p. 157.

“In the usual case the basis of past experience from which this conclusion may be drawn . . . is a matter of general knowledge. . . . It may, however, be supplied by the evidence of the parties; and expert testimony that such an event usually does not occur without negligence may afford a sufficient base for the inference. Comment d, p. 158–59.

“[T]he plaintiff is not required to exclude all other possible conclusions beyond a reasonable doubt, and it is enough that he makes out a case from

which the jury may reasonably conclude that the negligence was, more probably than not, that of the defendant.” Comment f, p. 160.

“It frequently is said by courts that one basis for the application of the principle of *res ipsa loquitur* is the defendant's superior knowledge, or his superior opportunity to obtain it, as to how the event occurred. . . . Undoubtedly the fact that in *res ipsa loquitur* cases defendants in general have such superior knowledge, or access to it, has been a very persuasive factor in the development of the principle.” Comment k, p. 164.

Perkins, 828 S.W.2d at 655-56. However, “[r]eliance upon the doctrine of *res ipsa loquitur* is predicated upon a showing that (1) the defendant had full control of the instrumentality which caused the injury; (2) the accident could not have happened if those having control had not been negligent; and (3) the plaintiff's injury resulted from the accident.” *Sadr v. Hager Beauty School, Inc.*, 723 S.W.2d 886, 887 (Ky. App. 1987) (citation omitted). Clark cannot meet the first prong of this test because the appellees did not have full control over the gloves; Kita had access to gloves in several locations, including the school, the hospital, and her doctor's office, to name a few. Therefore, Clark cannot rely upon this doctrine to circumvent the lack of evidence of where and when Kita ingested the glove.

Accordingly, we hold that the circuit court did not commit any error in finding that no genuine issues of material fact existed and that the appellees were entitled to a judgment as a matter of law because Clark failed to establish a breach of duty. Based upon our holding, we need not address whether Clark should have

identified expert witnesses pursuant to CR 26.02 or whether the appellees were shielded from suit based upon the doctrine of qualified official immunity.

For the foregoing reasons, the judgment and order of the Jefferson Circuit Court are affirmed.

VANMETER, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

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