

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-001770-MR

GRIFFIN BRACKMAN DAVIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 12-CI-05161

HEATH GALLENTINE, D.C., and  
LEXINGTON FAMILY CHIROPRACTIC,  
PLLC

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KRAMER, CHIEF JUDGE; COMBS AND JONES, JUDGES.

COMBS, JUDGE: Griffin Brackman Davis has appealed from the October 13, 2015, order of the Fayette Circuit Court granting summary judgment in favor of Lexington Family Chiropractic, PLLC and Heath Gallentine, D.C., on his claim for damages based upon medical malpractice. Following a careful review of the briefs, the record, and the applicable law, we affirm.

Davis, *pro se*, filed his malpractice claim against Gallentine, a Lexington chiropractor, for malpractice on November 21, 2012. Davis claims that Gallentine deviated from the applicable standard of care during his visit for treatment related to weakness in his leg and ankle on November 23, 2011. He also alleges that Gallentine was reckless and that he acted with a conscious disregard for his health and safety. Davis contends that Gallentine's chiropractic manipulation on that date caused him to suffer permanent physical, emotional, and psychological injuries that impeded his collegiate swimming career and his future as a triathlete. He claims that Gallentine was negligent by failing to conduct a proper and thorough examination; by failing to take a proper and adequate history; by failing to give a diagnosis before undertaking the manipulation; and by failing to obtain informed consent.

During discovery, Davis disclosed Stephen Pobst, D.C., as an expert witness in support of the breach and causation aspects of his claim. Pobst examined Davis on May 28, 2014, and diagnosed him with faulty movement patterns. Pobst admitted that this diagnosis was so broad that it could not be properly coded and that it could be made for anyone whom he examined.

In a report prepared following his evaluation of Davis, Pobst noted as follows:

To clarify, faulty or dysfunctional movement patterns can occur for multiple reasons: repetitive movement patterns, poor ergonomics, previous injuries, poor posture, structural anomalies, etc. It [is] nearly impossible to determine what came first: poor movement

patterns that allowed an adjustment to his lumbar spine [to] exacerbate any underlying issue or an adjustment to his lumbar spine that created dysfunctional movement patterns. Regardless, the patient presented to Dr. Gallentine's office with no previous recorded history of low back pain of any sort. . . . Following this visit, Mr. Davis has suffered from low back pain that has decreased his functional capacity. . . .

In a disclosure filed with the court, Davis's counsel indicated that he expected Pobst to testify that Gallentine had breached the standard of care by:

Failing to elicit and/or to comprehend an accurate account of [Davis's] history and physical complaints; failure to appropriately address [Davis's] actual complaints; wrongfully ascribing many complaints of pain and disability to the patient that were inaccurate and non-existent, failing to perform an adequate physical examination prior to attempting spinal manipulations; failing to arrive at a diagnosis prior to attempting spinal manipulations; failing to explain the risks and benefits associated with the spinal manipulations he performed; and by failing to obtain informed consent.

Further, Dr. Pobst is expected to testify that, based upon a reasonable degree of scientific probability, the failures mentioned were substantial factors in causing harm to [Davis] including chronic mental and physical pain & suffering, in causing functional deficits, and in causing [Davis] to incur further expense for diagnosis and treatment of his injury. Dr. Pobst is expected to testify that, as a result of the injuries sustained by [Davis], he recommends both psychosocial evaluation and treatment and evaluation to address the emotional and psychological issues related to [Davis's] injuries and treatment by a movement specialist to address [Davis's] pain and abnormal movement patterns.

During his deposition, Pobst admitted to defense counsel that the chiropractic standard of care could encompass more than one treatment approach.

He volunteered that the “chiropractic profession is hard to tie down to standards” in view of the judgment that is required with each patient. Pobst even agreed that if Gallentine’s records of his interaction with Davis were accurate, Gallentine **did not** deviate from the standard of care by performing the manipulations at issue.

We note the following exchange between Pobst and defense counsel:

Q            Would that documentation as to what the examination – orthopedic examinations revealed, would it have been appropriate for Dr. Gallentine to perform the adjustments that he performed?

A            According to Exhibit 3, then – yes, then that adjustment would be fine.

Q            Can you look at the examination results from Dr. Gallentine as documented with that Exhibit 3?

A            Yes, ma’am.

Q            What did it reveal, according to that?

.....

A            Okay. It showed it was positive Goldthwait’s. I believe he found that it was a pelvic issue, if I remember correctly. Yeah, it was present on the right side. And then it was a positive straight leg raise, but it did not specify as to at what angle.

Q            Based upon that documentation, it would have been appropriate for Dr. Gallentine to do the adjustments that he performed?

A            Yes, ma’am.

Q            And you do not hold any opinion that the adjustments that he performed were done negligently, do you?

A            If these were – if these orthopedic tests were found to be positive and they elicited pain the way it has been documented, then – and informed consent was found – or was given, and he consented, there there’s no – and obviously the history and this whole exhibit, or 3, then there’s no negligence there, if this is accurate and informed consent was verbally given.

Q            Okay. There was no negligence in his selection of those treatment modalities, nor in his method of performing them?

A            No, ma’am.

With respect to causation, the following exchange between Pobst and defense counsel is contained in the deposition:

Q            Okay. So, the medical providers [who examined Davis following Gallentine’s chiropractic manipulation] couldn’t come up with a cause for the pain?

A            Yes.

Q            Or the medical providers thought the pain was inconsistent with what the objective evidence was showing?

A            From what I would read, it seemed as though there would be – they could not clearly define as to why he was having pain.

Q            Do you know when [Davis] started experiencing pain in the back?

A            I mean, from my understanding, it was – he never felt quite right following the adjustment.

Q And there is a difference between feeling not quite right and comparing it to having pain?

A Right.

Q Okay.

A He would say that “I was in pain.” I think he was in pain immediately and then it just became a change in biomechanics which then changed his functional capacity.

....

Q So do you know when it evolved from feeling not quite right to having pain?

A It was pain that was also the feeling of not feeling right as well.

Q And when did it evolve into changing his biomechanics?

A I mean, it’s hard to say. I mean, I don’t know.

Q Okay. Are you prepared to offer the opinion that within reasonable medical probability that the pain is related to a chiropractic manipulation?

A It’s – that’s a very tough question to answer. I mean, Mr. Davis said that he had no pain in his low back whatsoever prior to the adjustment, and he didn’t feel as though he was examined or really understood what was going on. And then he got an adjustment and he’s never felt right since then.

So, do I feel like there is a probability that the adjustment created that low back pain? I mean, I hate to say one way or the other, but it seems to point that, yes, that his low back pain could have been caused from – and what I said in my report . . . it’s almost impossible to figure out what came first, you know. Did he have an

underlying movement pattern that was exacerbated by an adjustment? Totally plausible. Or vice versa. . . . But I can't say. I have no idea.

. . . .

Q Probability means more likely than not.

A I would say – I'm not – the probability of – I mean, I feel as though the adjustment did create his low back pain that he experienced following it. I'm not certain to say the level of dysfunction that he's experienced now is – I can't say. I don't know.

It would be my opinion, you know, and it would be – there's nothing other than that.

Q Okay. So, you cannot testify that within reasonable medical probability any problems that he's experienced since that chiropractic adjustment are related to an adjustment performed by Dr. Gallentine?

A I would say that it's all – I would say it's very possible that everything he has experienced has been exacerbated from an adjustment.

Except in limited factual circumstances not relevant here, the plaintiff in a medical negligence case is required to present expert testimony that establishes: (1) the standard of care and skill expected of a reasonably competent medical practitioner and (2) that the alleged negligence proximately caused an injury. *Perkins v. Hausladen*, 828 S.W.2d 652 (Ky. 1992). The opinion of the expert must be based upon reasonable medical probability -- not mere speculation or possibility. *Sakler v. Anesthesiology Associates, P.S.C.*, 50 S.W.3d 210 (Ky. App. 2001). In order to survive a motion for summary judgment in a medical malpractice case where a medical expert is required, the plaintiff must produce

such testimony. Otherwise, summary judgment is proper. *Turner v. Reynolds*, 559 S.W.2d 740 (Ky. App. 1977).

The deposition testimony of Pobst is insufficient to create a material issue of fact as to the negligence either of Gallentine or of Lexington Family Chiropractic. Pobst did not testify under oath that it was a reasonable medical probability that an improper chiropractic manipulation caused injury to Davis's back. On the contrary, Pobst explicitly agreed that Gallentine's documentation of Davis's examination indicated that Gallentine had **not** deviated from the standard of care -- either by selecting the treatment modalities that he chose or in his method of performing them.

With respect to causation, Pobst agreed that among the multitude of medical providers that Davis has consulted following his treatment with Gallentine (including chiropractors, sports medicine specialists, orthopedic surgeons, neurologists, osteopathic and pain management specialists, and physical therapists), not one of them could link Gallentine's chiropractic manipulation to the pain that Davis described. Moreover, Pobst only reluctantly opined that "it's very possible that everything [Davis] has experienced has been exacerbated from an adjustment." This possibility, he admitted, was based solely upon the history given by Davis indicating that he had not experienced back pain before the manipulation.

At most, Pobst established a mere temporal correlation between Davis's subjective complaints and Gallentine's treatment without a diagnosis of a condition



or injury. Furthermore, the history that Davis provided to Pobst was contradicted by the records of the numerous medical providers who treated or examined Davis following Gallentine's manipulation. Physician progress notes from May 2012 are in accord with the opinions of other medical providers and indicate that Davis's impaired movement issues "most likely" relate to the ankle sprain he had suffered before being treated by Gallentine. Pobst's testimony was not sufficient to overcome the motion for summary judgment.

We affirm the summary judgment of the Fayette Circuit Court.

KRAMER, CHIEF JUDGE, CONCURS.

JONES, JUDGE, DISSENTS AND WILL NOT FILE

SEPARATE OPINION.

BRIEF FOR APPELLANT:

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