RENDERED: APRIL 26, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000325-MR

DONNA CAMPBELL — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 11-CI-00581

MOHAMMED Q. ISLAM, M.D. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, JONES, AND NICKELL, JUDGES.

GOODWINE, JUDGE: Appellant, Donna Campbell ("Campbell"), appeals from a Perry Circuit Court order granting summary judgment in favor of Appellee, Dr. Mohammed Islam ("Dr. Islam"). The trial court found that it would be impossible for Campbell to prevail in her medical negligence action against Dr. Islam because she did not have an expert to testify that he deviated from the standard of care.

Therefore, the trial court found Dr. Islam entitled to a judgment as a matter of law. After a careful review, finding no error, we affirm.

BACKGROUND

In September of 2003, Campbell met with her primary care physician in Hazard, Kentucky. During the appointment, she reported numbness and weakness on the left side of her face. Campbell also suffered from "heaviness," complaining that her limbs felt heavier than they should at times, and her movement was confined to the use of a cane. After the appointment, the primary care physician referred Campbell to Dr. Mohammed Islam, a neurologist employed by the Mountain Neurology Clinic.

On September 29, 2003, Campbell had an initial appointment with Dr. Islam. She explained her comings and goings of weakness and numbness, all of which began after her involvement in a car accident from two years prior. At that time, Dr. Islam performed a neurological exam, eliciting objective findings of motor and sensory deficits. Due to her symptoms, demographics,[1] and findings from her exam, he ordered an MRI of the brain, attempting to rule out multiple sclerosis ("M.S.")[2] or a stroke. Dr. Islam also ordered other tests commonly

[1] As a white female in her mid-thirties, Campbell fell within the demographic of patients who experience the initial presentation of M.S.

[2] M.S. is an auto-immune disease that affects the central nervous system. Neurologists diagnose and treat the disease.

associated with M.S. diagnoses, including a brain auditory evoked potential exam ("BAEP"), electroencephalogram ("EEG"), electrocardiography ("EKG"), and lab work.[3] He did not test Campbell's cerebrospinal fluid.

Considering his previous findings, coupled with the recent test results, Dr. Islam diagnosed Campbell with M.S. From 2003 to 2009, Dr. Islam treated Campbell and prescribed her a series of medications.[4] He initially prescribed her Avonex shots. She took Avonex for six months but switched to Rebif interferon shots because the side effects of Avonex were making her sick. She continued taking Rebif injections for M.S. treatment, and did so for the remaining time Dr. Islam treated her.

On May 11, 2006, Campbell suffered an attack commonly associated with M.S., and was hospitalized. While hospitalized, she underwent another MRI. According to the radiology report, her results suggested small vessel disease, but otherwise, no other abnormalities. Dr. Islam reviewed and disagreed with the report, finding lesions consistent with M.S. in the periventricular and juxtacortical areas of Campbell's brain. While reading the report, Dr. Islam coupled the MRI's findings with the context of Campbell's clinical features, which lead him to

[3] The results of these tests ruled out the possibility of stroke, peripheral neuropathy, and cardiac issues, which could have been the likely cause of Campbell's symptoms.

[4] An individual diagnosed with M.S. often has "flare-ups," which can cause neurological injuries. Dr. Islam prescribed medications commonly associated with M.S. treatment that reduce the likelihood and severity of flare-ups.

disagree with the radiologist. At that time, Dr. Islam also ordered a test of her cerebral spinal fluid, another supportive test in M.S. diagnosis. The test results showed zero oligoclonal bands[5] in Campbell.

In 2009, Dr. Islam moved from Kentucky to New York, ceasing his treatment of Campbell. The next year, Campbell met with another neurologist, Dr. Chandrashekar Krishnaswamy. As his patient, she met Dr. Krishnaswamy on two occasions, March 17 and April 9 of 2010.

During the March 17 appointment, Campbell informed Dr. Krishnaswamy of her current symptoms—the same symptoms for which she complained to Dr. Islam—and told him Dr. Islam diagnosed her with M.S. in 2003.[6] Further, she told him that her past MRIs were normal, and a past cerebral spinal fluid test was negative. During this appointment, Dr. Krishnaswamy ordered an MRI because Campbell had not had one within the last year.

During the April 9 appointment, Dr. Krishnaswamy received and read the MRI report and corresponding imaging. From his review, he found the report abnormal. Given that the April 9 MRI report came back abnormal and, per

[5] Oligoclonal bands are proteins that present in the cerebrospinal fluid. There are monoclonal, polyclonal, and oligoclonal bands. These proteins manifest in 90% of M.S. patients' cerebrospinal fluid, while not present in 10% of M.S. patients.

[6] During their two appointments, or any time prior to the filing of this action, Dr. Krishnaswamy never reviewed Campbell's prior medical records. Instead, he only made clinical notes based on her testimony. The only time he saw any relevant medical records was when Defendant's counsel deposed him.

Campbell, other MRIs were normal in the past, Dr. Krishnaswamy referred her to neurology specialist, Dr. Joseph Berger, for a second opinion.

Later that year, Campbell met with Dr. Berger. At the time, he was the chairman of the Department of Neurology at the University of Kentucky, as well as the Director and Founder of U.K.'s M.S. Clinic. Dr. Berger ordered two MRIs, one of the brain and another of the cervical spine. He further looked at her cerebrospinal fluid, ordered evoked potential tests, and ordered an array of laboratory studies. During their consultation, he had no prior medical records for Campbell, having to paint a patient history from what she told him. Campbell explained to him that complications began in 2003, during her early 30's, and described the symptoms she experienced. Based on this, Dr. Berger stated that it was quite reasonable for a doctor to suspect that these signs and symptoms related to M.S.[7]

While reviewing her MRI, Dr. Berger noticed that it was abnormal, showing several scattered, white matter lesions. He explained that the abnormality was not sufficiently diagnostic for him to say Campbell had M.S. But he further explained that it "could be [multiple sclerosis]" and his interpretation was that it

[7] During his deposition, Dr. Berger admitted that he was not aware, at the time of treating, that Campbell had: (1) bouts of numbness; (2) weakness detected by Dr. Islam; and (3) at least two subsequent episodes where her symptoms worsened and was felt to have a relapse. He explained that all these circumstances were "keeping with a diagnosis of multiple sclerosis." Deposition of Dr. Joseph Berger, p. 14.

was "possibly multiple sclerosis." Deposition of Dr. Joseph Berger, p. 15. Her cervical spine MRI came back normal. Also, the laboratory studies showed that Campbell had an elevated antinuclear antibody[8] and ruled out a myriad of other diseases and conditions, including B-12 deficiency, Lyme disease, sarcoidosis, Sjogren's syndrome, and systemic lupus. Finally, her visual evoked potential was normal, while the audio evoked potential showed abnormal delay. Given the circumstances, Dr. Berger could not rule out M.S., but did not feel like he had sufficient evidence to make such a diagnosis.[9] Ultimately, given the waxing and waning nature of M.S. symptoms, Dr. Berger wanted to see Campbell in a year to review her condition and revisit the issue of M.S.

On November 11, 2011, Campbell filed a civil action against Dr. Islam for medical negligence. Six years later, Dr. Islam moved for summary judgment. The trial court granted Dr. Islam's motion on January 18, 2018. In its order, the trial court found Dr. Islam entitled to a judgment as a matter of law because: (1) Campbell identified no expert to testify Dr. Islam deviated from the standard of care; and (2) she supplied the court with no competent medical

[8] Dr. Berger explained that this was a nonspecific finding and not diagnostic, but one that neurologists see with regularity in people with autoimmune diseases. He stated that about 40% of M.S. patients show these abnormalities. *Id*. at 17.

[9] Once again, like Dr. Krishnaswamy, Dr. Berger did not view any past medical records while treating Campbell.

evidence to support her allegation that Dr. Islam committed medical negligence. This appeal followed.

STANDARD OF REVIEW

Under Kentucky law, this Court shall grant summary judgment when the entirety of the record shows "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[10] 56.03; *See Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). There are no disputed facts before us today, but rather, whether the trial court correctly applied the law to said facts. Thus, since this is a question of law, our review is *de novo*. *Grange Mut. Ins. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

ANALYSIS

This is a medical negligence case. Our analysis hinges on whether Campbell provided sufficient evidence to sustain a *prima facie* case of negligence against Dr. Islam. Under Kentucky law, generally, the plaintiff must produce expert evidence to survive a motion for summary judgment in a medical negligence case. *Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky. 2006); *see Blankenship v. Collier*, 302 S.W.3d 665, 670 (Ky. 2010) ("[A] plaintiff alleging medical malpractice is generally required to put forth expert testimony to show that

[10] Kentucky Rules of Civil Procedure.

the defendant medical provider failed to conform to the standard of care.") (internal citations omitted).

Here, Campbell offered Dr. Krishnaswamy as her expert. Per her CR 26 expert disclosure, Dr. Krishnaswamy offered two opinions: (1) "the standard for a physician practicing general neurology is to refer a patient with symptoms suggestive of multiple sclerosis to a neurologist specializing in the diagnosis and treatment of multiple sclerosis"; and (2) "the standard for a physician requires him to have the complete clinical picture, with the appropriate diagnostic test results before prescribing the patient medication." R. at 180-81. We find these opinions particularly troubling because Dr. Krishnaswamy's deposition testimony blatantly contradicts them.

First, the expert report stated that Dr. Krishnaswamy believes a general neurologist must refer a patient with M.S. symptoms to a specialist, rather than diagnose and treat said patient. Parsing through Dr. Krishnaswamy's deposition shows that he does not hold this belief:

> Q: [Dr. Krishnaswamy,] there are two opinions that are listed there, and I want to discuss those with you.
>
> . . . .
>
> Q: The first one says, letter A, the standard for a physician practicing general neurology is to refer a patient with symptoms suggestive of multiple sclerosis to a neurologist specializing in the diagnosis and treatment

> of multiple sclerosis. Now, is that your opinion that the standard of care requires a referral to a specialist?
>
> A: No.
>
> Q: Because you're not a specialist in multiple sclerosis, are you?
>
> A: No, I'm not a specialist in multiple sclerosis, but it doesn't mean to say that every time we need to send the patient to a specialist.
>
> Q: Sure. It's a case by case basis?
>
> A: Yes, correct.[11]

Furthermore, Dr. Krishnaswamy stated he treated patients medically for M.S.[12] and does not always refer "[suspected M.S. patients] to the specialist[.]"[13]

Second, the other opinion stated, "the standard for a physician requires him to have the complete clinical picture, with the appropriate diagnostic test results before prescribing the patient medication." Specifically, Campbell contends that Dr. Islam breached the standard of care for failing to perform a spinal tap of her cerebrospinal fluid and placing her on M.S. medication. Once again, Dr. Krishnaswamy's deposition contradicts this opinion.

[11] Deposition of Dr. Krishnaswamy, p. 15-16.

[12] *Id*. at 10.

[13] *Id*.

Regarding Dr. Islam's diagnosis and subsequent treatment of Campbell, Dr. Krishnaswamy stated in his deposition:

> Q: [ ] Are you critical of Dr. Islam for diagnosing Ms. Campbell with MS?
>
> A: I cannot say I am critical, but I had my one parts. I think I was a little bit, I wanted more opinion, so that's the reason I sent to UK.
>
> Q: But you're not critical of Doctor Islam, are you?
>
> A: Yeah, I'm not critical.
>
> **Q: And you are not going to offer the opinion that Doctor Islam deviated from the standard of care in 2003, are you?**
>
> **A: No, I'm not going to give any opinion.**[14]

Furthermore, Dr. Krishnaswamy indicated that he would defer to Dr. Berger in terms of diagnosis and in terms of treatment recommendations he thought were reasonable. Per his deposition:

> Q: When we went and had the opportunity to talk with Doctor Berger, I asked him a couple of questions and I just want to share a few with you and see if you would agree. Based upon your review, and this is Doctor Berger, ... of those diagnostic results as well as Doctor Islam's notations on Ms. Campbell's presentation to him, was multiple sclerosis a reasonable diagnosis by Dr. Islam, and he responded yes. Would you agree with that?
>
> A: Yes.

[14] *Id*. at 27 (emphasis added).

Clearly, the record, and the entirety of Dr. Krishnaswamy's deposition, indicates Campbell cannot offer expert testimony proving Dr. Islam deviated from the standard of care. Therefore, we find the trial court's summary judgment ruling proper.

Briefly, we address Campbell's reference to Dr. Berger's testimony in her reply brief as means to prove her *prima facie* case. Under Kentucky law, we cannot review statements made in Dr. Berger's deposition as expert testimony because Campbell failed to disclose him as an expert, or any opinions he may have rendered, during discovery. CR 26. But we note that our decision would not change, even if we allowed his testimony. During his deposition, Dr. Berger stated: (1) Dr. Islam's M.S. diagnosis was appropriate and reasonable;[15] (2) Dr. Islam's early treatment of Campbell's condition was "quite appropriate";[16] (3) that he believes the earlier you treat someone with M.S., the better off they are;[17] (4) that the medications Dr. Islam prescribed do not have any lasting side effects;[18] (5) from his view, Campbell had a degree of exaggeration to her symptoms;[19] and (6)

[15] Deposition of Dr. Joseph Berger, p. 23.

[16] *Id*.

[17] *Id*. at 26.

[18] *Id.*

[19] *Id.*

that he thought it would be unwise for any physician to conclude she did not have M.S. because of her complaints, findings elicited in prior examinations, and the abnormalities seen in her MRIs.[20]

Also, we choose not to address Campbell's *res ipsa loquitor* argument. From our review of the record, the first time Campbell raised the argument was during her CR 59.05 motion to alter, amend, or vacate the trial court's summary judgment ruling. "A motion to alter, amend, or vacate judgment cannot be used to raise arguments and introduce evidence that should have been presented during the proceedings before entry of judgment." *Short v. City of Olive Hill*, 414 S.W.3d 433, 441, n. 7 (Ky. App. 2013). Lately, many attorneys look at CR 59 motions as an all-you-can-eat-buffet, picking and choosing any argument they see fit to present on their plate to the court. We strongly discourage this practice. CR 59 has a finite purpose and using it as an avenue to re-litigate or bring new issues before the court is improper.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Perry Circuit Court granting summary judgment in favor of Dr. Islam.

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[20] *Id.* at 27.

NICKELL, JUDGE, CONCURS.

JONES, JUDGE, CONCURS BY SEPARATE OPINION.

JONES, JUDGE, CONCURRING: I do not disagree with the majority's analysis. I write separately only to highlight what I believe to be an even more fundamental defect in Appellant's claim than the defects highlighted by the majority. When boiled down to its simplest terms, Appellant's complaint alleges that Dr. Islam was negligent because he treated her with medications for M.S. when in fact she does not have and never had M.S.

Appellant, however, has not produced a medical opinion from any expert or treating physician that she does not have M.S. While the last doctor to treat Appellant, Dr. Berger, recommended that Appellant discontinue the medications Dr. Islam prescribed to treat his diagnosis of M.S., Dr. Berger was unwilling to diagnose Appellant as not suffering from M.S. He indicated only that before he could diagnose Appellant with M.S. he would need to follow her for some additional time and perform more analysis of her condition. Appellant discontinued her treatment with Dr. Berger before he was able to reach a definitive conclusion regarding whether she does or does not have M.S.

All of the medical experts uniformly agree that if Appellant does have M.S., the medications Dr. Islam prescribed would have been appropriate. Without an expert willing to testify that Appellant does not have M.S., I am at a loss as to how

Appellant could ever prevail in her claim against Dr. Islam.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Jeremy R. Morgan Hazard, Kentucky	Clayton L. Robinson Jonathan D. Weber Lexington, Kentucky