

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 1027

TIANYA SPIEWAK

VERSUS

DR. STERLING E. SIGHTLER, DR. PHILLIP A. BARKSDALE AND
WOMAN'S HOSPITAL

Judgment Rendered: FEB 14 2014

Handwritten initials 'TMH' and two signatures, one appearing to be 'MTH' and another more stylized signature.

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 605,228

Honorable R. Michael Caldwell, Judge Presiding

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Tianya Spiewak
Baton Rouge, LA

Plaintiff-Appellant,
In Proper Person

Charles J. Boudreaux, Jr.
John F. Colowich
Lafayette, LA

Attorneys for Defendant-Appellee,
Phillip A. Barksdale, M.D.

Mary H. Thompson
Baton Rouge, LA

Attorney for Defendant-Appellee
Woman's Hospital

Janie Languirand Coles
Baton Rouge, LA

Attorney for Defendant-Appellee
Sterling E. Sightler, M.D.

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

In this medical malpractice action, plaintiff, Tianya Spiewak appeals the trial court's granting of a motion for summary judgment in favor of the defendants, Dr. Sterling Sightler and Dr. Phillip Barksdale. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 1, 2009, Tianya Spiewak was admitted to Woman's Hospital to undergo two surgical procedures. The first procedure was a transvaginal hysterectomy to be performed by Dr. Sterling Sightler, followed by a sling urethropexy to be performed by Dr. Phillip A. Barksdale. During the hysterectomy, Ms. Spiewak sustained a 4 cm laceration to her bladder, but it was not detected until the completion of the hysterectomy. After confirming that there was a laceration to Ms. Spiewak's bladder, Dr. Barksdale performed an exploratory laparotomy to evaluate and repair the bladder with bilateral stinting. Dr. Barksdale did not perform the sling procedure because of the bladder injury. After the surgery, Ms. Spiewak has suffered pain, nausea, and increased incontinence.

Initially, Ms. Spiewak filed a medical review panel complaint with the Patient's Compensation Fund. On August 15, 2011 the medical review panel issued its decision finding no deviation from the appropriate standard of care.

On September 15, 2011, Ms. Spiewak filed a "Petition for Damages" in the 19th Judicial District Court naming Dr. Sightler, Dr. Barksdale, and Woman's Hospital¹ as defendants. In her petition, Ms. Spiewak contends that the defendants were negligent and violated the applicable standard of care, and as a result of their negligence she suffered physical pain, mental anguish, and permanent impairment.

¹ Woman's Hospital also filed a motion for summary judgment, which was granted. That judgment is the subject of a related appeal. *Tianya Spiewak v. Dr. Sterling E. Sightler*, 2013 CA 1028 (La. App. 1st Cir. 2/14/14). Ms. Spiewak addressed the summary judgment granted in favor of Woman's Hospital in her brief filed in 2013 CA 1027 and the summary judgment against Dr. Sightler and Dr. Barksdale in 2013 CA 1028. Although we recognized her error, we considered her briefs for the appropriate appeal number.

Ms. Spiewak further contends that the laparotomy was not discussed with her and she did not consent to that procedure.

Dr. Barksdale on August 2, 2012, and Dr. Sightler, on August 17, 2012 filed motions for summary judgment in which they maintained that there were no issues of material fact in this matter and that they were entitled to summary judgment as a matter of law. Specifically, they contend that as of the filing of their motions, Ms. Spiewak provided no proof that they failed to comply with the applicable standard of care. Further, Dr. Barksdale pointed out that Ms. Spiewak did not produce any expert medical evidence to establish that the alleged negligence of defendants caused her damages.

The motions for summary judgment were heard on October 22, 2012. On November 2, 2012, judgment was signed granting summary judgment in favor of Dr. Sightler and Dr. Barksdale and dismissing with prejudice Ms. Spiewak's claims against them. Ms. Spiewak timely filed this appeal. In her only assignment of error, she contends that the trial court erred in finding that she could not prove her medical malpractice claim without expert medical testimony.

DISCUSSION

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Duncan v. U.S.A.A. Ins. Co.**, 2006-363 (La. 11/29/06), 950 So.2d 544, 547. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B)(2). When a motion for summary judgment is made and properly supported, an adverse party may not rest on the mere allegations of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. La. Code Civ. P. art. 967(B). If the plaintiff fails to produce factual support sufficient to establish that

he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. Code Civ. P. art. 966(C)(2).

In a medical malpractice action against a physician, the plaintiff must establish, by a preponderance of the evidence, the applicable standard of care, a violation of that standard of care, and a causal connection between the alleged negligence and the plaintiff's injuries. See La. R.S. 9:2794(A); see also **Pfiffner v. Correa**, 94-0924 (La. 10/17/94), 643 So.2d 1228, 1233.

An expert witness is generally necessary as a matter of law to meet the burden of proof on a medical malpractice claim. **Lieux v. Mitchell**, 2006-0382 (La. App. 1st Cir. 12/28/06), 951 So.2d 307, 314, writ denied, 2007-0905 (La. 6/15/07), 958 So.2d 1199. Although the jurisprudence has recognized exceptions in instances of obvious negligence, those exceptions are limited to instances in which the medical and factual issues are such that a lay person can perceive negligence in the charged physician's conduct as well as any expert can. **Pfiffner**, 643 So.2d at 1234.

In support of their respective motions for summary judgment, Dr. Barksdale and Dr. Sightler attached the opinion of the medical review panel which states:

It is the opinion of this medical review panel that there was no deviation from the appropriate standard of medical care by Dr. Phillip Barksdale, Dr. Sterling Sightler and Woman's Hospital Foundation. The injury to adjacent organs during a hysterectomy is a known complication. The bladder laceration was timely recognized and dealt with in a timely and appropriate fashion... The panel feels the signed consent was appropriate and the records of Dr. Barksdale and Dr. Sightler reflect that risks and complications of this procedure were discussed preoperatively.

In opposition to the motion for summary judgment, Ms. Spiewak attached an affidavit signed by her stating that she continued experiencing bladder problems, and an affidavit signed by her daughter, Elizabeth DeCastro, stating that she did not consent to the exploratory laparotomy. Ms. Spiewak also attached her pre- and post-operative medical records and pictures depicting the extreme difficulties she has had since the surgery. Although Ms. Spiewak offered no expert testimony in

opposition to the motion for summary judgment, she relied on **Pfiffner v. Correa** for the proposition that the medical and factual issues were such that a lay person could perceive negligence in the actions of Dr. Barksdale and Dr. Sightler. Specifically, she argued that any lay person could infer negligence on the part of Dr. Sightler for identifying and severing the wrong organ and on the part of Dr. Barksdale for his failure to obtain consent from her prior to performing the laparotomy and failure to provide timely and adequate follow-up care.

The jurisprudence has recognized that there are situations in which expert testimony is not necessary. Expert testimony is not required where the physician does an obviously careless act, such as fracturing a leg during examination, amputating the wrong arm, dropping a knife, scalpel, or acid on a patient, or leaving a sponge in a patient's body, from which a lay person can infer negligence. See Hastings v. Baton Rouge Gen. Hosp., 498 So.2d 713, 719 (La. 1986). Failure to attend a patient when the circumstances demonstrate the serious consequences of this failure, and failure of an on-call physician to respond to an emergency when he knows or should know that his presence is necessary are also examples of obvious negligence which require no expert testimony to demonstrate the physician's fault. See Id. at 719-20.

This is not a case of obvious negligence. It involves a complicated medical procedure. We therefore decline to apply the exception created in **Pfiffner** to the instant case. Dr. Barksdale and Dr. Sightler produced the medical review panel opinion which concludes that they did not breach the applicable standard of care, that the injury to adjacent organs during a hysterectomy is a known complication, and that the bladder laceration was timely recognized and dealt with in a timely and appropriate fashion. There was no evidence presented to suggest that Dr. Sightler wrongly identified an organ. That was only presented as Ms. Spiewak's opinion. Further, "injury to the bladder" was noted as an uncommon risk in the consent form for the hysterectomy signed by Ms. Spiewak.

Dr. Barksdale performed the laparotomy in order to correct the incision to the bladder while Ms Spiewak was still under anesthesia. A doctor is not required to disclose material risks or information when a genuine emergency arises because the patient is unconscious or otherwise incapable of consenting, and harm from a failure to treat is imminent and outweighs harm threatened by the proposed treatment. **Hondroulis v. Schuhmacher**, 553 So.2d 398, 413 (La. 1988)(on rehearing). The medical review panel determined that Dr. Barksdale appropriately dealt with this injury. Ms. Spiewak offered no evidence to prove Dr. Barksdale's actions were negligent considering the immediacy in which he had act. Further, the evidence she presented in opposition to the motion for summary judgment failed to prove that Dr. Barksdale was negligent in the follow-up care he provided.

We find that Ms. Spiewak was required to present expert medical evidence to establish that Dr. Sightler's and Dr. Barksdale's actions fell below the standard of care and caused her injuries. Without expert evidence, Ms. Spiewak failed to show that she will be able to carry her burden of proof at trial. Accordingly, she has failed to establish a genuine issue of material fact. See La. Civ. Code art. 966(C)(2).

CONCLUSION

On our *de novo* review of the motion for summary judgment, we conclude that there were no genuine issues of material fact and that Dr. Barksdale and Dr. Sightler were entitled to summary judgment as a matter of law. Thus, the judgment of the trial court is affirmed. All costs of the appeal are assessed to plaintiff-appellant, Ms. Tianya Spiewak.

AFFIRMED.