

Wheeler v. Mid-Vt. ENT, P.C., No. 657-8-08 Rdcv (Cohen, J., Mar. 9, 2009)

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**STATE OF VERMONT
RUTLAND COUNTY**

KAREN M. WHEELER)	Rutland Superior Court
)	Docket No. 657-8-08 Rdcv
Plaintiff,)	
)	
v.)	
)	
MID-VERMONT ENT, P.C. and)	
DAVID R. CHARNOCK, M.D.)	
)	
Defendants)	

DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on a Motion for Summary Judgment, pursuant to V.R.C.P. 56(c), filed by defendants Mid-Vermont ENT, P.C. and David R. Charnock, M.D., on December 8, 2008. Plaintiff Karen M. Wheeler filed a motion to move forward without an expert on November 21, 2008. Plaintiff also filed an Objection to Motion for Summary Judgment, and Request for ruling from the Court regarding necessity of an expert in plaintiff's case on December 10, 2008. A hearing was held on January 26, 2009.

On February 2, 2009, the Court issued an Order ordering that within 30 days plaintiff would have to (1) disclose to the Court and defendants that she would not hire an expert, or (2) disclose an expert witness the Court and defendants.

On February 9, 2009, defendants filed an Addendum to their Motion for Summary Judgment.

On February 12, 2009, plaintiff filed a Response to the Court's Order of February 2, 2009, stating that in response to the Order it was not her intention at this time to hire an expert. Defendants filed a Response on February 18, 2009. On February 24, 2009, Plaintiff filed a response to defendant's response of February 18, 2009.

Plaintiff Karen M. Wheeler appears *pro se*. Defendants Mid-Vermont ENT, P.C. and David R. Charnock, M.D. are represented by Karen S. Heald, Esq.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In response to an appropriate motion, judgment must be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue of material fact exists, the Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson v. Mylan Labs, Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356. The nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver v. State*, 2003 VT 71, ¶ 2, 175 Vt. 397. Furthermore, where, as here, "the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 18 (1995) (internal citations omitted).

Background

Plaintiff Karen M. Wheeler filed a complaint on August 29, 2008, alleging medical negligence on the part of defendants Mid-Vermont ENT, P.C. and David R. Charnock, M.D.

In her complaint, plaintiff alleges that in October 2005 she was diagnosed with a deviated septum and enlarged turbinates, which required surgery to fix the deviated septum and reduce the size of the turbinates. Plaintiff was treated by defendant David R. Charnock, M.D., who performed the surgery. Plaintiff alleges that Dr. Charnock negligently performed the surgery, thereby causing plaintiff to be permanently injured.

Plaintiff alleges that during the surgery, Dr. Charnock allowed a piece of bone to remain in the right turbinate, creating several complications, which required the removal of the bone during a subsequent visit by plaintiff to Mid-Vermont ENT, and subsequent surgery at Rutland Regional Medical Center in July 2006.

Plaintiff alleges that defendant Dr. Charnock either lacked the degree of knowledge or skill ordinarily exercised by a reasonably skillful, careful, and prudent health care professional, or failed to exercise this degree of care in various aspects concerning her surgery and treatment. Plaintiff alleges that she continues to suffer with nose pain, ear pain, migraines, and throat pain due to the endless flow of mucus which is a direct and proximate result of defendant Dr. Charnock's negligence.

Plaintiff has presented no expert testimony establishing the standard-of-care, that defendant Dr. Charnock failed to exercise this standard-of-care, or that defendant Dr. Charnock's alleged negligent conduct was the cause of plaintiff's injuries.

In plaintiff's Response to the Court Order, dated February 12, 2009, plaintiff

stated that it was not her intention to hire an expert at this time. Plaintiff argues that an expert witness is not necessary because the alleged negligence is so apparent as to be comprehensible to an average juror.

Discussion

In a malpractice action based on medical negligence, the plaintiff shall have the burden of proving (1) the degree of knowledge or skill possessed or the degree of care ordinarily exercised by a reasonably skillful, careful, and prudent health care professional engaged in a similar practice under the same or similar circumstances whether or not within the state of Vermont; (2) that the defendant either lacked this degree of knowledge or skill or failed to exercise this degree of care; and (3) that as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have occurred. 12 V.S.A. § 1908(1)-(3).

Put more plainly, in an action for medical malpractice, plaintiff has the burden of proving the applicable standard-of-care, that defendant breached that standard, and that as a proximate result plaintiff suffered injuries that would not otherwise have occurred. *Jones v. Block*, 171 Vt. 569, 569 (2000) (mem.) (citing 12 V.S.A. § 1908(1)-(3)).

The standard-of-care and causation elements of professional negligence claims ordinarily must be proved by expert testimony. *Wilkins v. Lamoille County Mental Health Services, Inc. and Copley Hospital*, 2005 VT 121, ¶ 16, 179 Vt. 107. There is an exception to the rule requiring expert testimony in medical malpractice cases, however, where the alleged violation of the standard-of-care is so apparent that it may be understood by a lay trier of fact without the aid of an expert. *Larson v. Candlish*, 144 Vt.

499, 502 (1984) (citing *Senesac v. Associates in Obstetrics and Gynecology*, 141 Vt. 310, 313 (1982)). Plaintiff argues that the exception recognized, though not applied, in *Larson* and *Senesac* applies in this case.

Larson involved a dental malpractice claim arising out of the allegedly negligent use of novocain and nitrous oxide by the dentist, Dr. Larson, during a root canal procedure. 144 Vt. at 500-01. The plaintiff failed to present any evidence on accepted anesthetic procedures, and on any deviation by Dr. Larson from accepted procedures. *Id.* at 502. The trial court noted, and the Supreme Court agreed, that “except for the unsubstantiated opinion of Mrs. Candlish [plaintiff], there [was] no evidence whatever that Dr. Larson failed properly to perform the endodontic procedure....” *Id.* The Court declined to apply the exception requiring expert testimony, stating “we see no such obvious deviation from accepted practices as to preclude the requirement of expert testimony.” *Id.* *Larson* is not unlike the case before this Court.

Likewise, in *Senesac* the Court declined to apply the exception in a case involving allegedly negligent performance of an abortion procedure. 141 Vt. at 313. The plaintiff did not introduce any independent medical testimony on the standard of care ordinarily possessed and exercised in like cases by physicians in the same general line of practice. *Id.* In declining to apply the exception, the Court stated that “[a] complicated surgical procedure is at issue, which is not easily evaluated by a lay person.” *Id.*

In the instant case, plaintiff alleges medical negligence arising out of a surgical procedure to fix a deviated septum and reduce the size of her enlarged turbinates. Like in *Larson*, the only evidence before this Court is the unsubstantiated opinion of plaintiff Ms. Wheeler that defendant Dr. Charnock failed to properly perform the surgery. See *Larson*,

144 Vt. at 502. Furthermore, “[a] complicated surgical procedure is at issue, which is not easily evaluated by a lay person.” See *Senesac*, 141 Vt. at 313. The Court does not agree with plaintiff that the alleged negligence by Dr. Charnock in performing the surgical procedure is “so apparent as to be comprehensible to an average juror.” See *Id.* This case requires plaintiff to prove the applicable standard-of-care and causation elements by expert testimony. See *Wilkins*, 2005 VT 121, ¶ 16. Plaintiff has failed to set forth any expert evidence as to these elements.

Defendants have shown the Court that there is an absence of expert testimony evidence in the record, as required by law, to support plaintiff’s case. Plaintiff has failed to proffer any expert testimony; therefore, plaintiff has failed to persuade the Court that there is a triable issue of fact. See *Ross v. Times Mirror, Inc.*, 164 Vt. at 18. Summary judgment, pursuant to V.R.C.P. 56(c), is appropriate in this case.

ORDER

Plaintiff’s Motion to move forward without an expert, filed November 21, 2008, is DENIED.

Defendants’ Motion for Summary Judgment, filed December 8, 2008, is GRANTED.

Dated at Rutland, Vermont this ____ day of _____, 2009.

Hon. William Cohen
Superior Court Judge