



Worley v. Arthur

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NOT DESIGNATED FOR PUBLICATION

AFFIRMED

Appellant Ruby Worley appeals the trial court's granting summary judgment for appellees in this medical injury case. We agree that there are no material issues of fact left to be determined and affirm.

In November of 1989, appellant was treated by Dr. Allan Gocio at the Hot Springs Neurosurgery Clinic subsequent to an injury she received after falling while working at a department store. Cervical spine x- rays taken at that time showed spondylosis at the C4-C6 level of her spine. An MRI of the cervical spine revealed degenerative changes from the C3-C6 levels, but no evidence of disc herniation or bulging.

Conservative treatment consisting of physical therapy and pain medication continued until September 1990. A myelogram performed on September 21, 1990, showed moderately severe spondylosis at the C5-C6 level with possible associated disc bulging, and mild bulging at C4-C5. On November 15, 1990, Dr. Gocio performed an anterior cervical discectomy and fusion, at which time he inserted an Orthoblock inter- space graft at the C5-C6 level of appellant's spine. Orthoblock is a dense form of hydroxylapatite, a ceramic material developed to replace bone in maxillofacial (dental) surgeries, that is manufactured by Calcitek, Inc.

After the surgery, appellant initially experienced relief but then developed progressive pain in her neck and arms. According to the history and physical taken by Dr. Richard Peek at St. Vincent Infirmary Medical Center on March 2, 1994, appellant asked to have her neck refused. A second C5-C6 anterior cervical fusion surgery was performed by Dr. Peek on March 2, 1994, at which time the Orthoblock was replaced with bone from appellant's hip. Following the surgery by Dr. Peek, appellant developed a stable fusion and had excellent pain relief for approximately three to four months. Then, according to her medical records, she again began experiencing pain in several areas of her body.

In a complaint filed on March 31, 1993, appellant alleged that appellees Dr. Gocio, James Arthur, M.D., and Hot Springs Neurosurgery Clinic, P.A., committed medical negligence by using Orthoblock as a spacer during the November 15, 1990, anterior cervical discectomy and fusion. She further alleged that the appellees failed to obtain her informed consent prior to the November 15,



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1990, surgery, and that the use of Orthoblock during the surgery without her informed consent constituted the tort of battery, the tort of fraud, and the tort of outrage.

Appellant also asserted strict products liability and breach of warranty claims against Calcitek, Inc., the manufacture of the Orthoblock product, but has since settled with the manufacturer. Finally, appellant asserted a medical malpractice claim against St. Joseph's Regional Health Center, where the November 15, 1990, surgery was performed. Summary judgment has since been entered dismissing her claim against the hospital.

In 1999, appellant's attorney, Charles Hicks, withdrew as counsel and appellant proceeded with the action pro se. On December 3, 1999, the appellees, Dr. Gocio and Dr. Arthur, filed for summary judgment. Appellees' motion for summary judgment was supported by an affidavit from Dr. Steven Cathey, a neurosurgeon in North Little Rock, Arkansas. In her attempt to resist the summary judgment motion, appellant submitted deposition testimony of George Sewell Allen, M.D. However, the testimony was deemed to be hearsay and not conforming with any exception to the hearsay rule. On June 5, 2000, the appellees' motion for summary judgment was granted. From that decision comes this appeal.

In *Crockett v. Essex Home, Inc.*, 341 Ark. 558, 19 S.W.3d 585 (2000), our supreme court articulated the standard of review to be followed in summary judgment cases:

In these cases, we need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. The burden of sustaining a motion for summary judgment is always the responsibility of the moving party.

All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. Our rule states, and we have acknowledged, that summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and when the moving party is entitled to summary judgment as a matter of law.

Once a moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents or depositions, the opposing party must demonstrate a genuine issue of material fact by meeting proof with proof.

Furthermore, the moving party may present pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, to support the burden of showing entitlement to summary judgment as a matter of law. *Crockett*, supra (quoting *Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d 653 (1997)) (citations omitted); see also Ark. R. Civ. P. 56.



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Appellant contends that the trial court erred in granting summary judgment on her claims of battery, fraud, and the tort of outrage. However, these claims are dependent on her ability to survive summary judgment on the informed consent claim. All of these claims are in essence claims that she was not adequately informed of the experimental nature of the Orthoblock device nor the risks associated with the procedure. Accordingly, we will address appellant's informed consent claim first.

Informed Consent Under Arkansas law, adequate disclosure of the risks of a procedure is measured by "the customary practice of physicians in the community in which the medical care provider practices or in a similar community." *Brumley v. Naples*, 320 Ark. 310, 318, 896 S.W.2d 860, 865 (1995) (citing *Fuller, Adm'x v. Starnes*, 286 Ark. 476, 479, 597 S.W.2d 88, 90 (1988)); Ark. Code Ann. § 16-114-206(b) (Repl. 1999). This statute places the burden on the plaintiff to prove that a medical care provider failed to supply information necessary for the patient to give informed consent. Ark. Code Ann. §16-114-206(b)(1) (Repl. 1999).

In the case at bar, appellant signed a written consent form which states, in pertinent part, as follows:

e. I have had sufficient opportunity to discuss my condition and treatment with the doctor and his associates, and all of my questions have been answered to my satisfaction. I belief that I have adequate knowledge upon which to base an informed consent to the proposed treatment.

a. The nature and purpose of the operation and/or procedures, the necessity therefore, the possible alternative methods of treatment, the risks involved, the risks of non-treatment, and the possibility of complications in the treatment of my condition have been fully explained to me, and I understand the same. I recognize that the practice of medicine and surgery is not an exact science, and I acknowledge that no guarantees or assurances have been made to me concerning the results of suck such procedures.

This statement was signed by appellant on November 14, 1990. Additionally, appellant's deposition testimony provides further support that she consented to the procedure. In her July 28, 1998, deposition, appellant testified as follows:

A: . . . He [Dr. Gocio] did say - he says, "You know, it's dangerous surgery. It's a major medical surgery," you know blah, blah, blah, you know, "and we are working near the spinal cord, you know. But I have monitors. Your spinal cord will be monitored. So there's really no worry. But there is a chance." You know he did say that. And what else was it he said? I can't remember.

Therefore, it is undisputed that at least some information was disclosed to appellant, and it therefore becomes her burden to establish her claim that the disclosed information was inadequate. *Brumley v. Naples*, 320 Ark. at 315-18, 896 S.W.2d at 865.

Appellees correctly instruct this court that, in meeting the requisite burden of proof with regard to



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the disclosure standard under Ark. Code Ann. § 16-114-206(b), a plaintiff must "always" provide expert medical testimony from which a jury could determine whether the medical care provider breached his or her duty to disclose information necessary for the informed consent to be given. *Fuller Adm'x v. Starnes*, 268 Ark. at 479, 826 S.W.2d at 90. In *Fuller*, the supreme court upheld a directed verdict in favor of a medical care provider where plaintiffs failed to produce expert medical evidence establishing a disclosure standard from which a jury could assess the reasonableness of the medical care provider's conduct.

Also, as discussed by appellees, in *Brumley*, 320 Ark. at 315-18, 896 S.W.2d at 865, a trial court granted summary judgment in favor of a medical provider when the plaintiff's disclosed expert "could not offer expert testimony, as required by section 16-114-206(b), on the issue of informed consent." The supreme court affirmed, holding that in the absence of medical testimony on this issue, the plaintiff "had not meet her burden of proof and that no material issue of fact existed with respect to informed consent which required presentation of the case to the jury." *Brumley*, 320 Ark. at 318, 896 S.W.2d at 865.

Therefore, in the case at bar, we conclude that the trial judge was correct in requiring expert testimony from appellant to avoid summary judgment.

Appellant did attempt to produce expert testimony in support of her informed consent claim to meet her burden of proof and avoid summary judgment. She produced the March 1996 deposition of Dr. George Allen from another Orthoblock case, *Hall v. Arthur, et al.*, U.S.D.C 95-6047 (W.D. Ark.).¹ However, appellant had not retained Dr. Allen as her expert, nor had Dr. Allen reviewed any of appellant's medical records.

Appellant cites *F.D.I.C. v. Hinch*, 879 F. Supp. 1099, 1107 (N.D. Okla. 1995), for the proposition that the statement of Dr. Allen should be admitted for the purpose of resisting summary judgment. However, *F.D.I.C.* held that inadmissible evidence should only be considered at the summary judgment stage "if it could be reduced to an admissible form at trial." (Citing *Cook v. Babbitt*, 819 F. Supp. 1, 25 (D. D.C. 1993).

In the present case, there is no evidence that Dr. Allen was contacted by appellant, or that he agreed or would ever agree to review her medical records or to testify at trial. Moreover, his previous opinion in the *Hall* case could never be reduced to an admissible form for the trial of this case because the opinion refers to a different patient and a different time of treatment. The statements by Dr. Allen are clearly hearsay and hearsay statements are excluded from the summary judgment analysis "since such statements would be inadmissible at trial and violate [Rule 56(e)'s] own call for 'facts as would be admissible in evidence.'" *Jones v. Abraham*, 58 Ark. App. 17, 23, 946 S.W.2d 711, 714 (1997) (citing Ark. R. Civ. P. 56(e)).

Appellant responds by arguing on appeal that Dr. Allen's statements should have been admitted into



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evidence because the deposition testimony came within an exception to the hearsay rule. Specifically, she argues that Dr. Allen's former testimony should be admissible because it constitutes former testimony from an unavailable declarant. Ark. R. Evid. 804(b)(1). Unfortunately, appellant failed to make this argument below.

Arguments not raised below will not be considered on appeal. *Grandjean v. Grandjean*, 315 Ark. 620, 869 S.W.2d 709 (1994). And, although appellant is bringing her appeal pro se, she is nonetheless held to the same standards as attorneys. *Jewell v. Arkansas State Bd. Of Dental Examiners*, 324 Ark. 463, 921 S.W.2d 350 (1996).²

In order to survive summary judgment on her informed consent claim, appellant was required to provide expert testimony. She failed to do so. Therefore, appellant's informed consent claim was correctly dismissed by the trial court on appellees' motion for summary judgment. Once her informed consent claim was dismissed, there were no longer any genuine issues of material fact to be resolved in appellant's claims of battery, fraud and the tort of outrage, as these claims are based in appellant's assertion that she was not adequately informed of the risks or the experimental nature of the surgery using the Orthoblock device. Therefore, the claims were properly dismissed on summary judgment. Medical Negligence

Appellant next asks this court to reverse the trial court's granting of summary judgment on her medical negligence claim. In order for her claim of medical negligence to survive, the plaintiff must establish:

- 1) The degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality; and
- 1) That the medical care provider failed to act in accordance with that standard. Ark. Code Ann. § 16-114-206(a) (1)-(2) (Repl. 1997).

In this case, appellees introduced an affidavit from Dr. Steven Cathey, a board-certified neurosurgeon practicing in North Little Rock, Arkansas. The affidavit established that Dr. Cathey was familiar with the standard of care applicable to neurosurgeons practicing in Hot Springs or in a similar community in the performance of appellant's November 15, 1990, surgery and use of the Orthoblock by Dr. Gocio during the surgery. In his affidavit, Dr. Cathey stated that Drs. Gocio and Arthur adhered to the standard of care in the performance of appellant's surgery. Dr. Cathey further stated that the goal of any fusion was to obtain a good, solid fusion and that was achieved with the use of Orthoblock in appellant's November 15, 1990, surgery.

Under Arkansas law, actions for medical injury "are dependent on expert testimony" where the plaintiff's claims are "based on allegations of a failure to provide needed medical care and attention



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or timely diagnosis of medical problems... ." Spring Creek Living Ctr. v. Sarrett, 319 Ark. 259, 262, 890 S.W.2d 598, 600 (1995). However, expert testimony is not required when the medical injury involves an issue within the jury's common knowledge, such as "a surgeon's failure to sterilize his instruments prior to operating or to remove a sponge before closing the incision." Skaggs v. Johnson, 323 Ark. 320, 325, 915 S.W.2d 253, 256 (1996) (citing Lanier v. Trammel, 207 Ark. 372, 180 S.W.2d 818 (1944)).

Appellant argues that she was not required to present expert testimony as to her claim of medical negligence in order to survive summary judgment. However, this case raises more complicated issues than one would expect a jury of lay people to comprehend. The medical treatment was not performed by a general physician, but a physician specializing in neurosurgery. The only expert testimony in this case on the issues of standard of care and the locality rule refuted appellant's allegation that appellees acted negligently, and appellant failed to meet proof with proof.

The trial court did not err by requiring appellant to provide expert testimony as to the applicable standard of care and whether or not that standard of care was breached. Accordingly, we affirm the trial court's grant of summary judgment as to appellant's claim of medical negligence.

Affirmed in all respects.

Hart and Neal, JJ., agree.

1. Ironically, in an attempt to prove that the testimony of Dr. Allen is hearsay, appellees used additional hearsay testimony from a prior deposition of Dr. Allen where he states his opinions are limited to the specific case in which he is testifying.

2. Even if the issue had been preserved for appeal, appellant could not prevail. The exception to the hearsay rule that she attempts to use is only available "if the declarant is unavailable as a witness." Ark. R. Evid. 804(b). "Unavailability" for purposes of the evaluation of admissibility of former testimony under Rule 804(b)(1), is defined by subsection (a) of Rule 804. Appellant laid no foundation to establish that Dr. Allen was "unavailable" for purposes of admitting his prior testimony under this rule, additionally the record contains no evidence that appellant has ever tried to contact Dr. Allen, or to procure his participation in the case.

