

JOYCE FRANCESE : PHILADELPHIA COUNTY
: COURT OF COMMON PLEAS
: TRIAL DIVISION
:
v. : AUGUST TERM, 1998
:
:
THE LANKENAU HOSPITAL, : NO. 2315
SCOTT H. BAILEY, M.D., ET AL. :

OPINION

Richard B. Klein

DATE: May 29, 2001

I) SUMMARY

Plaintiff Joyce Francese discovered what appeared to be a burn on her buttock while she was an inpatient at Lankenau Hospital in September, 1996. She was in the hospital for gynecological surgery. The burn was first seen three days after the surgery. Because it was not clear exactly how this burn could have been caused and which, if any, of the defendants could be identified as the one that caused it, I ordered a hearing on the summary judgment motion. It still was totally unclear whether or not the injury was something that could have occurred without negligence. Also, even if under *res ipsa loquitur*, the burn would not have been caused without negligence, there is no way the plaintiff can identify which of the health care providers would have caused the burn. Therefore, I granted the motion for summary judgment, thus dismissing the case. Plaintiffs are now appealing that decision.

The plaintiff's experts do not specifically identify any

evidence critical of Dr. Bailey or Lankenau. There is no showing that any Lankenau nurse, physician or other staff did anything wrong. All the expert reports say is that the woman had some injury that was "consistent with" a burn. There are a number of ways one can suffer a burn, and many of them have nothing to do with a physician's negligence. The reports are unclear as to how any of the procedures could have caused a burn in any event. There just is not enough evidence to show who, or, for that matter, if anyone, was negligent.

Plaintiff raises five issues in her Statement of Matters Complained of filed pursuant to PA.R.App.P 1925(b). None have merit. In summary, they are:

1. There was an error in granting summary judgment, since there was an informed consent issue. That argument fails, because there was nothing in any expert report indicating that a risk this kind of a burn is something that a reasonable person would want to know about before deciding whether or not to undergo a gynecological procedure.
2. The trial court erred in granting summary judgement because the plaintiff was in "the exclusive control" of hospital personnel during the hospital stay, and did not have any markings before she entered the hospital. This motion fails, because there were attending physicians as well as hospital staff taking care of her, and, moreover, sometimes

this kind of burns could occur during a procedure even without negligence.

3. The plaintiff claims the doctrine of *res ipsa loquitur* precludes summary judgment. Just because this kind of a burn does not occur usually in this kind of a surgery does not identify who or when the burn was caused. Plaintiff cannot just ask a jury to guess, as various health care providers treated the plaintiff.
4. Plaintiff claims a jury can rely on its common knowledge to find negligence if a hospital patient later develops a wound to a buttock and the expert opines it is "consistent with a burn." There are many ways someone can get burned.
5. Plaintiff claims she can survive summary judgment under the theory of "joint and several" liability. This claim is without merit, since there is not any claim that *everyone* who treated the plaintiff was negligent. A non-negligent person is not jointly or severally liable with anyone.

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Basically, all plaintiff has shown is that she came into the hospital with no marking on her buttock and three days later developed something that the experts say is "consistent with" a burn. Most particularly because multiple health care providers, some agents of Lanckenau and some independent contractors, treated plaintiff, and any one of them, or none of them, could have done

something wrong, does not mean that plaintiff has met her burden of proof against any of them. Since the expert reports are so vague, she has not even met her burden of proof to show that the injury is the fault of anyone's negligence.

A full discussion follows.

FACTS

Plaintiff was admitted to Lankenau for gynecological surgery, under the advice of Dr. Bailey, on September 25, 1996. Dr. Bailey was the plaintiff's attending physician during her stay at Lankenau. He was also the surgeon in charge of personnel in the operating room and he performed the following sequence of procedures on the plaintiff; a dilatation and curettage, and a total abdominal hysterectomy. In addition, non-defendant physicians performed a cholecystectomy and an exploration of the right kidney on the plaintiff during the September 25, 1996 surgery. For the hysterectomy and the cholecystectomy, electrocautery equipment and a grounding pad were used.

Plaintiff had no awareness of what happened to her from the time she was placed under anesthesia until she awoke in the recovery room. Upon admittance to Lankenau and prior to the surgery, an assessment of the plaintiff's skin revealed no breakdown. In addition, Dr. Bailey did not observe any marks on the plaintiff's right buttock prior to and during the surgery.

Three days after the surgery, Plaintiff experienced a

painful sensation on her right buttock and reported the pain to a Lankenau nurse. The nurse noted that the plaintiff had a grade II skin wound on her right buttock. Plaintiff was discharged from Lankenau without receiving treatment for the wounds. Thirteen days after the surgery, Dr. Bailey commenced treatment for the plaintiff's wounds during an office visit. Dr. Bailey characterized the wounds as a cautery burn.

DISCUSSION

The Plaintiff does not clearly state the reasons why the summary judgement motion should be over turned. Instead Plaintiff seems to just restate the facts stated in the argument for the summary judgement. Plaintiff still does not come up with anything convincing that identifies or even criticizes the care of any certain doctor. Plaintiff simply has no expert witness and can not point to any one surgery or doctor that caused the injury to the plaintiff.

Plaintiff's first argument on appeal is that there was an error in granting summary judgement since there was an informed consent issue. The goal of informed consent law is to provide the patient with material, not all known information necessary for the patient to determine whether to proceed with the given procedure or to remain in the present condition. Doctors are not required to give every patient a complete course in anatomy and to explain every risk no matter how remote before a consent will

be valid. Jeffries v. McCague, 242 Pa. Super 76, 363 A.2d 1167 (1976). Claims based on a lack of informed consent require expert testimony to establish that an undisclosed risk occurred and that this risk was one a reasonable person would have wanted to know about prior to deciding to have the surgery. Nogowski v. Alemo-Hammad, 456 Pa. Super 750, 691 A.2d 950 (1997). In the present case, plaintiff presents nothing in their expert report that says a reasonable person would want to know if an injury "consistent with" a burn on the buttocks may occur before deciding to have this type of surgery. Thus the first issue fails.

The second issue raised on appeal is that the trial court erred in entering summary judgement because the plaintiff was in the exclusive control of hospital personal during the hospital stay and she did not have any markings on her before she entered the hospital. This claim fails because in addition to the hospital staff, there were attending physicians taking care of her while she was an inpatient and it is not clear that the hospital has a liability for all the people involved with her care. The claim also fails because this kind of burn could occur without negligence. In order to establish the standard of care, expert testimony is required. Brophy v. Brizuela, 358 Pa. Super. 400, 517 A.2d 1293. Plaintiff has not presented an expert witness who says that this type of injury does not occur unless

negligence was present. Thus since the Plaintiff has not shown that any care the plaintiff received was below the standard of care required the hospital can not be held responsible even if they would be liable for the parties involved.

The third issue raised on appeal is that the doctrine of *res ipsa loquitur* precludes summary judgement. The doctrine of *res ipsa loquitur* as provided in the Second Restatement of Torts states that;

1) It maybe inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

a) the event is of a kind which ordinarily does not occur in the absence of negligence

b) other responsible causes including the conduct of the plaintiff and third persons are sufficiently eliminated by the evidence AND

c) the indicated negligence is within the scope of the defendants duty to the plaintiff.

This *res ipsa* argument was correctly denied by granting the summary judgement motion. First, the plaintiff has not shown through expert witnesses that this burn is something that occurs without negligence. They have not submitted an expert report which states that this type of burn during a surgical procedure can not occur without negligence. Second, the plaintiff has not eliminated third parties from fault. The plaintiff has not

pointed to one defendant who should be held at fault and since there were several doctors and nurses involved in several operations they have not eliminated by evidence the possibility of third parties being at fault.

The fourth issue on appeal is that an expert opinion was not necessary to win this case. Plaintiff argues that the jury could have relied upon their common knowledge to find negligence in this case and thus no expert opinion was necessary. It is well established law that in order to prove medical negligence, a plaintiff must introduce expert testimony to prove that the conduct at issue deviated from accepted standards of medical practice, and that the deviation caused injury to the plaintiff. Brannan v. Lanckenau Hospital, 490 Pa. 588, 417 A.2d 196 (1980). The requirement of expert testimony is applicable only to those instances where there is "no fund of common knowledge from which layman can reasonably draw the inference or conclusion of negligence." Toogood v. Rogal, 2000 PA Super. 344, 764 A.2d 552 (2000) *citing* Jones v. Harrisburg Polyclinic Hospital, 496 Pa. 465, 437 A.2d 1134 (1981). This exception to the general rule of expert testimony is only applicable when the manner is so simple or the lack of skill or care is so obvious as to be within the range of experience and comprehension of even non-professional people. Hightower-Warren v. Silk, 548 Pa. 459, 698 A.2d 52 (1997). It is not obvious what happens to patients during

surgical procedures. Most laypeople do not have the skills or knowledge to know how a patient is positioned during surgery or how a burn could occur during a surgical procedure. It was the plaintiff's burden to have an expert witness present this information. The Plaintiff did not meet this burden when they failed to submit an expert witness who said this burn deviated from accepted standards of medical procedures.

Plaintiff's last issue on appeal is that she can survive summary judgement under the theory of "joint and several" liability. Under Pennsylvania law, it is well established that if the tortious conduct of two or more persons combines to cause a single harm which cannot be apportioned, the actors are joint tortfeasors even though they may have acted independently; thus, they are jointly and severally liable to the plaintiff for his or her injuries. Kovalesky v. Giant Rug Company, 422 Pa. Super. 116, 618 A.2d 1044 (1993). The Plaintiff does not make a claim that everyone who treated her was negligent. Thus, since a non-negligent person can not be jointly or severally liable with anyone the claim for "joint and several" liability must fail.

The Plaintiff failed to meet her burden of proof to bring a medical malpractice claim. She has failed to show that the injury was a result of anyone's negligence. The case was correctly dismissed at the summary judgement level.

