

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84130

MARZELLA COLEMAN, ET AL.	:	
	:	ACCELERATED DOCKET
Plaintiffs-Appellants :		
	:	JOURNAL ENTRY
-vs-	:	
	:	and
KAISER PERMANENTE OF OHIO ETC. :		
	:	OPINION
Defendant-Appellee :		
	:	

DATE OF ANNOUNCEMENT                      OCTOBER 14, 2004  
OF DECISION:

CHARACTER OF PROCEEDING:              Civil appeal from  
Common Pleas Court  
Case No. CV-458458

JUDGMENT:                                      Affirmed.

DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiffs-Appellants:              PAUL M. KAUFMAN  
801 Terminal Tower  
50 Public Square  
Cleveland, Ohio 44113-2203

For Defendant-Appellee:              DENNIS R. FOGARTY  
Davis & Young  
1700 Midland Bldg., 101 Prospect Ave.  
Cleveland, Ohio 44115

MARILENA DISILVIO  
THOMAS B. KILBANE  
HOLLY M. WILSON  
Reminger & Reminger Co., LPA  
1400 Midland Bldg., 101 Prospect Ave.  
Cleveland, Ohio 44115-1093

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} In this accelerated appeal, appellant Marzella Coleman appeals from the trial court's entering summary judgment in favor of appellee Kaiser Permanente of Ohio, Kaiser Foundation Health Plan of Ohio, Ohio Permanente Medical Group and Kim Fitzgerald, M.D. (collectively referred to as Kaiser where appropriate) on her medical malpractice claim. Coleman assigns the following error for our review:

{¶ 2} "The trial court committed error by granting summary judgment to the defendants, Kaiser Permanente, Kaiser Foundation Health Plan of Ohio, Ohio Permanente Medical Group and Kim Fitzgerald, M.D."

{¶ 3} Having reviewed the record and pertinent law, we affirm the trial court's order. The apposite facts follow.

{¶ 4} Coleman filed suit against Kaiser for medical malpractice. Coleman contended Dr. Fitzgerald failed to diagnose her urethral diverticulum condition, which resulted in Coleman enduring several months of pain. Coleman consulted another physician who correctly diagnosed and resolved her problem.

{¶ 5} Initially, Coleman failed to provide an expert report to support her claim of malpractice; therefore, Kaiser filed a motion for summary judgment. Based on representations from

Coleman’s counsel that an expert had been retained, the trial court denied the summary judgment motion and permitted Coleman ten additional days in which to file her expert report.

{¶ 6} Coleman presented a letter from Dr. Rodney Appell as the expert report. Dr. Appell was the physician who successfully treated Coleman’s condition. Because Dr. Appell’s letter did not include an opinion regarding the standard of care as it related to Dr. Fitzgerald’s treatment, Kaiser filed a motion for summary judgment, which was unopposed by Coleman. The trial court granted Dr. Fitzgerald’s motion.

{¶ 7} Coleman appeals and argues the trial court erred by granting summary judgment when disputed issues of fact remained regarding whether Dr. Fitzgerald breached his standard of care.

{¶ 8} We consider an appeal from summary judgment under a de novo standard of review.<sup>1</sup> Accordingly, we afford no deference to the trial court’s decision and independently review the record to determine whether summary judgment is appropriate.<sup>2</sup> Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can only reach one conclusion which is adverse to the non-moving party.<sup>3</sup>

---

<sup>1</sup>*Baiko v. Mays* (2000), 140 Ohio App.3d 1, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188.

<sup>2</sup>*Id.* at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

<sup>3</sup>*Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327.

{¶ 9} The moving party carries an initial burden of setting forth specific facts which demonstrate his or her entitlement to summary judgment.<sup>4</sup> If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will only be appropriate if the non-movant fails to establish the existence of a genuine issue of material fact.<sup>5</sup>

{¶ 10} In the instant case, Kaiser’s motion was not opposed by Coleman. Therefore, summary judgment is appropriate when the nonmoving party does not produce evidence on any issue for which that party bears the burden of production at trial.<sup>6</sup> Of course, even when a motion for summary judgment is unopposed, the motion and supporting evidence must show the absence of any material fact before the court can grant the motion.<sup>7</sup> This is demonstrated by the language of Civ.R. 56(E) which states that if a party does not oppose a motion for summary judgment, “summary judgment, if appropriate, shall be entered against the party.”<sup>8</sup> Thus, we will not consider any argument Coleman makes in response to the summary judgment, except insofar as those arguments point to issues of material facts in the respective motions and supporting evidentiary materials.

---

<sup>4</sup>*Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

<sup>5</sup>*Id.* at 293.

<sup>6</sup>*Abram v. Greater Cleveland Regional Transit Auth.*, Cuyahoga App. No. 80127, 2002-Ohio-2622 at §43.

<sup>7</sup>*Charles Gruenspan Co. v. Thompson*, Cuyahoga App. No. 80748, 2003-Ohio-3641.

<sup>8</sup>*Id.*, citing to *Mullen v. St. Paul Fire & Marine Ins. Co.* (C.A.1, 1992), 972 F.2d 446, 452.

{¶ 11} The Ohio Supreme Court has long held that in order to establish medical malpractice, the plaintiff must show: 1) the standard of care recognized by the medical community, 2) the failure of the defendant to meet the requisite standard of care, and, 3) a direct causal connection between the medically negligent act and the injury sustained.<sup>9</sup> It is well established that failure to provide the recognized standards of the medical community is fatal to the presentation of a prima facie case of medical malpractice.<sup>10</sup> The exception to that rule is “in cases where the nature of the case is such that the lack of skill or care of the physician and surgeon is so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand and judge it.”<sup>11</sup>

{¶ 12} In this case, Coleman’s expert does not offer an opinion on whether Dr. Fitzgerald violated the standard of care recognized by the medical community. Dr. Appell’s letter to Coleman’s attorney provided a summary of care Coleman received from both Kaiser and Dr. Appell. He also opined that Kaiser delayed treating Coleman’s condition, which created discomfort to her. He finished by stating, “[I]f the individuals at Kaiser did not feel that they could accomplish the appropriate surgical intervention, then there is no question that she should have been referred to someone who could treat her in a more definitive fashion.” This opinion does not satisfy Coleman’s burden to present expert testimony that Dr. Fitzgerald’s care deviated from the standard of care as set

---

<sup>9</sup>*Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, paragraph one of the syllabus.

<sup>10</sup>*Rogoff v. King* (1993), 91 Ohio App.3d 438, 444; *Jones v. Roche Laboratories* (1992), 84 Ohio App.3d 135, 139.

<sup>11</sup>*Id.*

forth in the medical community. It simply set forth Dr. Appell's opinion the treatment of Coleman should have been handled differently.

{¶ 13} We note that Coleman has not attempted to argue at any stage of the proceedings that the common knowledge exception to the requirement of an expert opinion applies. A review of Coleman's claims demonstrate that she would need an expert to establish the standard of care and causation of her injury because the difference in symptoms between a urinary tract infection as diagnosed by Dr. Fitzgerald and a urinary diverticulum are not within the common knowledge of a lay person.

{¶ 14} We also note the trial court granted Kaiser's motion in limine to exclude the testimony of Dr. Appell because he failed to present an opinion relating to whether Dr. Fitzgerald breached the standard of care as recognized in the medical community. In fact, in his deposition, he stated he was retained not to give his opinion on Dr. Fitzgerald's care, but only to provide information regarding his care of Coleman. Therefore, the matter never would have proceeded beyond a directed verdict if it had gone to trial. Accordingly, Coleman's sole assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellants its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., J., and

DIANE KARPINSKI, J., CONCUR.

PATRICIA ANN BLACKMON  
PRESIDING JUDGE

N.B. This entry is an announcement of the court’s decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court’s decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court’s announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).