

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Sherie Hitch, etc.

Court of Appeals No. L-09-1292

Appellant

Trial Court No. CI06-6334

v.

Lorie Ann Thomas, D.O., et al.

DECISION AND JUDGMENT

Appellees

Decided: August 6, 2010

* * * * *

Michael F Becker, Pamela Pantages, and Paul W. Flowers,
for appellant.

James E. Brazeau, Jean Ann S. Sieler, and Jason M. Van Dam,
for appellees.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that granted summary judgment in favor of appellees Lorie Ann Thomas, D.O., and

St. Vincent Mercy Medical Center. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant Sherie Hitch, individually and as parent and next friend of Mackenzie Hitch, a minor, sets forth the following assignments of error:

{¶ 3} "Assignment of Error I: The trial judge erred, as a matter of law, by granting summary judgment in favor of defendant-appellees on the grounds that no genuine issues of material fact existed upon their claim of medical malpractice.

{¶ 4} "Assignment of Error II: An abuse of discretion was committed when the trial judge refused to prohibit defendant-appellees from misleading and confusing the jurors with baseless theories about possible alternative causations.

{¶ 5} "Assignment of Error III: The trial judge abused her discretion by prohibiting plaintiff-appellants from introducing probative and non-privileged evidence necessary to establish their medical malpractice claim.

{¶ 6} "Assignment of Error IV: The trial judge erred, as a matter of law, by dismissing the negligent supervision and training claim under Civ.R. 10(D)(2)(a)."

{¶ 7} The undisputed facts relevant to the issues raised on appeal are as follows. Appellant Sherie Hitch went to Flower Hospital in Toledo, Ohio, on December 26, 1996, experiencing labor pains. On that date, appellee Lorie Ann Thomas, D.O., was a second-year resident in the St. Vincent Mercy Medical Center's OB/GYN residency program and was assigned to the supervision of Dr. Dale Derick, a private and independent obstetrician, at Flower Hospital. As appellant's delivery progressed, the baby's left

shoulder became lodged in the birth canal (a condition known as shoulder dystocia). Dr. Derick was able to free the baby's shoulder and complete the delivery using the "Wood's corkscrew maneuver." Doctors observed bruising to the baby's upper extremities and determined that she had suffered damage to the brachial plexus nerve in her neck during delivery.

{¶ 8} On February 17, 2005, appellant filed a medical malpractice action against Dr. Thomas, Dr. Derick and St. Vincent Mercy Medical Center ("hospital"). The complaint alleged that appellant's baby, Mackenzie Hitch, had permanently lost the full functional use of her left arm during her delivery. Appellant further alleged that Dr. Thomas had applied excessive force during delivery and failed to initiate accepted medical maneuvers when the baby's shoulder became lodged against mother's pelvic bone.

{¶ 9} Appellant voluntarily dismissed the original case on October 10, 2006, and refiled against Dr. Thomas and the hospital on October 12, 2006. The newly-filed complaint contained a claim against the hospital for negligent management and/or training. Appellant settled the claim against Dr. Derick on November 8, 2006.

{¶ 10} Discovery efforts resumed and numerous motions and orders were filed. Following is a brief summary of each party's position as articulated by their respective expert witnesses in deposition.

{¶ 11} As to the issue of the appropriate standard of care, plaintiff offered the deposition testimony of Martin Gubernick, M.D. Dr. Gubernick offered three opinions

critical of appellees: first, Dr. Thomas applied "excessive traction" to the baby during delivery; second, Dr. Thomas failed to clearly document the events that transpired during the delivery, and third, Dr. Derick failed to adequately supervise Dr. Thomas, which was evidence of a deviation by the hospital from the appropriate standard of care for managing its residency program.

{¶ 12} Defendants' expert Robert DeMott, M.D., testified as to his opinion that Dr. Thomas provided appropriate and good care within the accepted standard of care and that rapid descent of the baby through the pelvis probably caused the injury to the brachial plexus. Wesley Beemer, M.D., testified as to his conclusion that the physicians did not act outside the standard of care.

{¶ 13} As to causation, Dr. Gubernick testified during deposition that excessive traction applied by Dr. Thomas directly caused the brachial plexus injury. Drs. Beemer and DeMott both testified that Mackenzie's injury was probably caused by the rapid second stage delivery when the left shoulder became stuck while the rest of the body continued to move through the pelvis, stretching the nerves.

{¶ 14} In a series of evidentiary rulings discussed in more detail below, the trial court excluded, among other things, the testimony of appellant's experts. On September 18, 2009, appellees moved for summary judgment. On October 20, 2009, the trial court granted summary judgment for appellees on the malpractice claim and dismissed the negligent program management and/or training claim.

{¶ 15} In support of her first assignment of error, appellant asserts that the trial court erred in granting summary judgment to appellees because Dr. Gubernick's expert testimony presents a genuine issue of fact for trial. Appellant argues that Dr. Gubernick's testimony was sufficiently reliable to meet Ohio's admissibility requirements and that the trial court's entry of summary judgment was therefore unwarranted.

{¶ 16} An appellate court's review of a summary judgment determination is conducted on a de novo basis, applying the same standard used by the trial court. Summary judgment will be granted when there remains no genuine issue of material fact and, considering the evidence most strongly in favor of a nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 17} To establish a claim of medical malpractice, a plaintiff must prove by expert testimony the applicable standard of care, a breach of that standard of care, and that the breach was a proximate cause of the injuries alleged. See, e.g., *Kester v. Brakel*, 10th Dist. No. 06AP-253, 2007-Ohio-495, ¶ 26-27. The facts upon which an expert's opinion is based must be those "perceived by the expert" or "admitted in evidence at the hearing." Evid.R. 703. "The failure to prove that the recognized standards of the medical community were not met or to prove that the failure to meet those minimum standards proximately caused the injury is fatal to a claim of medical malpractice." *Kester*, supra, at ¶ 26.

{¶ 18} The Supreme Court of Ohio has held that "[t]he determination of the admissibility of expert testimony is within the discretion of the trial court." *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶ 9.

{¶ 19} On April 13, 2009, appellees filed a motion in limine to exclude the various standard of care opinions of Dr. Gubernick, arguing that his opinions as to excessive force, lack of documentation and negligent supervision were unreliable, unfounded and speculative. Appellant opposed the motion only as to the doctor's excessive force opinion.

{¶ 20} Dr. Gubernick testified that Dr. Thomas breached the accepted standard of care by applying "excessive traction" to Mackenzie during delivery. When asked to identify the factual basis for his statement that Dr. Thomas applied excess traction, Dr. Gubernick responded:

{¶ 21} "Because this is a traction injury, and it would be a reasonable conclusion that both the doctor – the experienced doctor, Dr. Derick, and a less experienced doctor, Dr. Thomas – in fact, a resident in training, Dr. Thomas, was involved in the delivery. And it's a reasonable conclusion on my part to assume that it was Dr. Thomas and not Dr. Derick that provided excess traction."

{¶ 22} When questioned further as to the basis of his opinion, Dr. Gubernick testified:

{¶ 23} "But working backwards, and knowing that there is an injury, and trying to unravel how this injury occurred, and knowing that both physicians performed maneuvers

in delivering this baby, it's my opinion, with a reasonable degree of medical certainty, that it's the resident much more likely to commit this injury that [sic] it is an experienced attending."

{¶ 24} Dr. Gubernick testified further:

{¶ 25} "Q. Would you agree with me that there is no evidence that Lorie Thomas failed at any time to follow the directions of Dr. Derick while he was supervising her?

{¶ 26} "A. Nobody can remember anything in this case. You know, Dr. Thomas can't remember the case. Dr. Derick can't remember the case. They can't remember who did what.

{¶ 27} "Q. So is there any evidence?

{¶ 28} "A. No, because they can't remember anything."

{¶ 29} Dr. Gubernick continued:

{¶ 30} "And exactly when there was a transition from Dr. Thomas performing that delivery until Dr. Derick did the Wood's corkscrew maneuver is unclear."

{¶ 31} When asked again to explain the factual basis for his opinion that Dr. Thomas applied excessive traction, Dr. Gubernick responded, "It's based on the outcome and what happened here and the complete lack of documentation of anything to the contrary."

{¶ 32} Later in his deposition, Dr. Gubernick further indicated the lack of evidence to support his opinion:

{¶ 33} "Q. So all those things were charted, but there was not charted [sic] who did what maneuvers, correct?

{¶ 34} "A. Yeah, which is something we really want to know."

{¶ 35} On August 4, 2009, the trial court granted appellees' motion to exclude all of Dr. Gubernick's standard of care opinions. The trial court noted appellant's failure to oppose exclusion of the lack of documentation and negligent supervision testimony and found that, given that failure, it was unnecessary to provide any further analysis with respect to those opinions. As to Dr. Gubernick's opinion that Dr. Thomas applied excessive force during delivery, the trial court found that the opinion was "speculative, i.e., without foundation, and/or incompetent." The trial court continued:

{¶ 36} "* * * [t]he crux of Dr. Gubernick's opinion that Dr. Thomas 'probably' used excessive traction during Mackenzie's birth is his assumption that a resident such as Dr. Thomas is much more likely to do so than an experienced attending physician such as Dr. Derrick [sic] is.

{¶ 37} "However, Dr. Gubernick was unable to cite any personal experience or knowledge, studies or literature, or factual basis for his assumption. Thus, his opinion lacks proper foundation and is inadmissible pursuant to Evid.R. 703, which provides that '[t]he facts or data in the particular case upon which an expert bases an opinion may be those perceived by the expert or admitted in evidence at the hearing.'

{¶ 38} "Likewise, Dr. Gubernick's claim that brachial plexus injuries such as that sustained by Mackenzie Hitch occur more frequently with less experienced physicians

than they do with more experienced physicians, even if properly supported, does not establish, to a reasonable degree of medical certainty, that Dr. Thomas, rather than Dr. Derick, applied the excess traction."

{¶ 39} In another order dated August 4, 2009, the trial court granted appellees' motion asking the court to preclude appellant from offering Dr. Gubernick's causation opinions. The trial court found that Dr. Gubernick's causation opinions were speculative, lacked proper factual foundation and were not reliable under Evid.R. 702.

{¶ 40} Finally, in its October 20, 2009 judgment entry granting summary judgment, the trial court noted appellees' argument that, in response to the motion, appellant relied on expert opinions the court had already excluded. The trial court concluded that appellant's inability to provide any expert standard of care testimony precluded her from proving her prima facie case of medical malpractice.

{¶ 41} This court has thoroughly reviewed the record of proceedings in this case, including the depositions of appellant's proffered experts and the trial court's rulings as set forth above. Upon consideration thereof, we find that the trial court did not err by excluding Dr. Gubernick's standard of care and causation testimony and, accordingly, properly granted summary judgment in favor of appellees as there remained no genuine issue of material fact as to the claim of medical malpractice. Therefore, appellant's first assignment of error is not well-taken.

{¶ 42} In her second assignment of error, appellant asserts that the trial court abused its discretion by denying her motion in limine to exclude defense experts' possible

alternative theories of causation. Appellant asserts that the theories of causation proposed by the defense were speculative, unreliable and not stated to the requisite degree of probability. Upon consideration of the parties' arguments, the trial court denied the motion in limine, finding that the credibility of the expert causation opinions was a matter for the jury, rather than the court, to determine. In light of the trial court's grant of summary judgment, however, we find that the issue of the admissibility at trial of possible defense theories of causation is moot. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 43} In her third assignment of error, appellant asserts that the trial court erred by prohibiting certain probative evidence necessary to establish her medical malpractice case. First, appellant argues that the trial court erred by preventing her from offering the medical opinions of Dr. Shanaq, who had treated Mackenzie for her arm disability after her birth. Second, appellant asserts that the trial court erred by precluding her from questioning any witness or introducing any evidence at trial as to Dr. Thomas's credentials, qualifications, evaluations, academic rankings, work performance and work records. Third, appellant asserts that the trial court erred by ruling that appellees would be permitted to introduce evidence at trial of appellant's settlement with Dr. Derick for the limited purpose of informing the jury why Dr. Derick was not a party to the case.

{¶ 44} As we found under appellant's second assignment of error, evidentiary issues raised in anticipation of trial have been rendered moot by the trial court's decision

granting summary judgment in favor of appellees. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 45} In her fourth assignment of error, appellant asserts that the trial court erred by granting appellees' motion to dismiss the claim against St. Vincent Mercy Medical Center for negligent supervision and/or training of Dr. Thomas. The trial court based its dismissal on appellant's failure to file an affidavit of merit with respect to that claim as mandated by Civ.R. 10(D)(2)(a).

{¶ 46} Appellant asserts that Dr. Gubernick's sworn deposition testimony satisfied Civ.R. 10(D)(2)(a), which is intended to prevent meritless lawsuits. The record in this case reflects that Dr. Gubernick testified that he had been a clinical instructor at an accredited medical school since approximately 1986 and regularly reviewed the performance of residents. Dr. Gubernick concluded that the hospital in this case had failed to meet the standard of care imposed upon it for supervising residents and providing them with proper training. However, Dr. Gubernick also testified that he had never designed or directed an obstetric residency program and had never read any literature that addressed how residents should be supervised.

{¶ 47} In order to support a claim of negligent supervision, a plaintiff must produce expert testimony establishing the standard of care for such supervision, or a breach of that standard. *Wright v. Univ. Hosp. of Cleveland* (1989), 55 Ohio App.3d 227, 232, citing *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, at paragraphs one and two of the syllabus. As set forth above, the trial court in this case properly excluded Dr.

Gubernick's opinions as unreliable, including his opinions that Dr. Derick and the hospital failed to adequately supervise Dr. Thomas and that the hospital deviated from the accepted standard of care for running its residency program. Accordingly, that "unreliable" testimony could not be used to support the negligent supervision and training claim. Based on the foregoing, we find that the trial court did not err by dismissing the negligent supervision and training claim and, accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 48} On consideration whereof, substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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