

[Cite as *Click v. Georgopoulos*, 2009-Ohio-6245.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CAROL CLICK, et al.,)	
)	CASE NO. 08 MA 240
PLAINTIFFS-APPELLANT,)	
)	
- VS -)	OPINION
)	
GEORGE A. GEORGOPOULOS, M.D.,)	
)	
DEFENDANT-APPELLEE.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 06 CV 2998.

JUDGMENT: Affirmed.

APPEARANCES:
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For Defendant-Appellee: Attorney Kenneth Abbarno
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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: November 20, 2009

[Cite as *Click v. Georgopoulos*, 2009-Ohio-6245.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this Court. Plaintiffs-Appellant, Carol Click, Executrix of the Estate of Philip Click, appeals the decision of the Mahoning County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee, George A. Georgopoulos, M.D., in a medical malpractice and wrongful death action. On appeal, Click argues that summary judgment against her was improper, notwithstanding her failure to produce an expert witness, because the doctrine of *res ipsa loquitur* applies and negligence is presumed. She also takes issue with the trial court's dismissal of the suit with prejudice, instead of without prejudice. Upon review, Click's arguments are meritless.

{¶2} The trial court properly granted summary judgment in favor of Georgopoulos. Georgopoulos met his initial burden as the moving party by presenting evidence displaying the absence of a genuine issue of material fact. Click, however, failed to meet her reciprocal burden under Civ.R. 56, because she put forth no evidence in the form of expert testimony showing that Georgopoulos was negligent. The doctrine of *res ipsa loquitur* does not apply in this case because it is not necessarily within the knowledge or experience of laypersons to conclude that the foreign bodies left in the decedent's chest cavity could have only occurred as a result of Georgopoulos's negligence. Even if *res ipsa* did apply, summary judgment was nonetheless proper because Click failed to present any evidence demonstrating that Georgopoulos's alleged negligence proximately caused the decedent's death or any other injury. Finally, as a Civ.R. 56(C) motion for summary judgment constitutes adjudication on the merits; the trial court properly dismissed the case with prejudice. Accordingly, the judgment of the trial court is affirmed.

Facts

{¶3} On May 2003, Philip Click, Click's decedent, underwent heart surgery at St. Elizabeth Medical Center in Youngstown performed by Georgopoulos. Thereafter, the decedent recovered from the surgery but began to experience other medical problems. Ultimately, the decedent died on October 7, 2005.

{¶14} An autopsy was performed at the request of Click. The autopsy report identified the decedent's clinical history as that of a "62-year-old Caucasian male with a past medical/surgical history significant for myocardial infarctions, CABGx3 with redo (1996 and 2003), diabetes mellitus (type I), hypertension, hyperlipidemia, congestive heart failure, status post-partial bilateral foot amputation, and a history of tobacco use." The autopsy reflected that the decedent suffered from "severe coronary artery disease, which, in spite of repeated graphs that remain patent, lead to multiple myocardial infarcts and subsequent damage to various locations of the ventricular walls and septum." The report also notes that, "in addition to the occluded and highly stenotic native coronary vessels, the heart contained additional atherosclerotic lesions, focal areas of calcification, acute muscle injury and peripheral mural thrombi in the left atrium. Additional findings include diabetic nephropathy, moderate atherosclerosis and emphysema and these are also consistent with the patient's clinical history."

{¶15} The autopsy report further identified the existence of several foreign bodies in the decedent's chest cavity. Specifically, the report noted that: "as was identified on pre-mortem imaging studies, surgical materials consisting of felt pledgets and monofilament sutures, were identified in the anterior mediastinum and near the bypass graft ostia on the ascending aorta." However, the report concluded that the foreign material did not have a causal relationship to the decedent's death, stating: "There is associated foreign body reaction, but no evidence of infection in the surrounding soft tissue. The presence of these foreign materials does not appear to have any causal relationship to Mr. Click's demise." The cause of death was listed as an acute myocardial infarct, more commonly known as a heart attack.

{¶16} On August 2, 2006, Click filed a complaint against Georgopoulos, alleging that Georgopoulos breached the professional standard of care during the May 2003 heart surgery by leaving foreign bodies in the surgical side. She claimed this negligence "resulted in or contributed to the untimely death of [the decedent]." She further alleged that the decedent suffered extreme pain and suffering as a result of the negligence, and that the negligence contributed to the loss of extremities of his body. In addition, Click,

who also is the decedent's widow, asserted a loss of consortium claim. Click did not attach a Civ.R. 10(D)(2) affidavit of merit to the complaint. She requested additional time to file the affidavit "due to the urgency of meeting the statute of limitations in this case." Alternatively, Click asserted that an affidavit of merit might not be required because the negligence alleged, leaving foreign objects in the body cavity, needed no expert explanation. Georgopoulos answered on September 5, 2006, denying liability.

{¶7} Following a case management conference on June 1, 2007, a magistrate issued a discovery schedule, which, inter alia, ordered Click to identify all experts on or before January 15, 2008. Click failed to do so by that date. On March 5, 2008, Georgopoulos filed a motion for summary judgment, in which he argued that Click failed to identify an expert to support her allegations and therefore had failed to make out a prima facie case of medical malpractice against him. More specifically, Georgopoulos argued that Click failed to produce any evidence establishing negligence or causation, that there was no genuine issue of material fact, and that he was entitled to judgment as a matter of law. He attached an affidavit and a copy of the autopsy report in support of his motion.

{¶8} Click filed a brief in opposition on March 19, 2008. Click argued that the presence of foreign-bodied material left after surgery does not require expert testimony. In an attempt to create a genuine issue of material fact, Click attached an affidavit from her attorney, Michael Scala, and an exhibit consisting of a photograph. In the affidavit, Atty. Scala averred that the exhibit is a "document I provided Defendant's counsel during the discovery phase of litigation." Click alleged in her brief that this photograph depicts the surgical materials left inside the decedent during surgery. She further claimed:

{¶9} "[The] surgical materials served as a catalyst for infection that caused the Decedent to have recurring infections that culminated in both feet being partially amputated. Although his heart attack is unrelated to the surgery, the enormous stress on his body certainly distributed [sic] to his distress and effectively cause [sic] \$600,000.00 plus in medical bills for the surgery and his follow-up treatment."

{¶10} Notably, however, Click presented no testimony or other evidence in support

of those claims. In addition, Click requested more time to procure expert testimony.

{¶11} On October 15, 2008, Georgopoulos filed a motion requesting a ruling on his motion for summary judgment, noting that Click had yet to produce an expert witness. On October 27, 2008, Click filed an additional brief in opposition to summary judgment with leave to further plead. Click regurgitated the same arguments contained in her initial brief in opposition, and again attached an affidavit and a photograph allegedly depicting the foreign materials left in the decedent's chest cavity. She again requested additional time to procure expert testimony.

{¶12} On October 28, 2008, the trial court granted the trial court granted summary judgment in favor of Georgopoulos.

Summary Judgment

{¶13} In her first of two assignments of error, Click asserts:

{¶14} "The trial court erred, to the detriment of Appellant, by granting Appellee's motion for summary judgment."

{¶15} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court and, therefore, engages in de novo review. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121. Under Civ.R. 56, summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of the nonmovant, reasonable minds must conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243. A fact is material when it affects the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304, 733 N.E.2d 1186.

{¶16} When moving for summary judgment, a party must produce some facts that suggest a reasonable fact-finder could rule in her favor. *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 386, 701 N.E.2d 1023. "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a

material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 662 N.E.2d 264. The trial court's decision must be based upon "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." *Id.*, citing Civ.R. 56(C). The nonmoving party has the reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings. *Id.* at 293.

{¶17} "In order to establish medical malpractice, it must be shown by a preponderance of evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do some one or more of such particular things." *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 75 O.O.2d 184, 346 N.E.2d 673, at paragraph one of the syllabus.

{¶18} Fundamentally, medical malpractice actions are analyzed using common-law tort principles. *Powell v. Hawkins*, 175 Ohio App.3d 138, 2007-Ohio-3557, 885 N.E.2d 958, at ¶13. "Consequently, in medical-negligence claims, a plaintiff must generally prove the following: '[a] duty running from the defendant to the plaintiff, breach of duty by that defendant, damages suffered by the plaintiff, and a proximate cause relationship between the breach of duty and the damages.'" *Id.* at ¶13, quoting, *Hester v. Dwivedi* (2000), 89 Ohio St.3d 575, 578, 733 N.E.2d 1161.

{¶19} Georgopoulos met his burden as the moving party by coming forward with evidence demonstrating the non-existence of any issue of material fact. He attached the autopsy report, which noted the presence of the foreign matter in the decedent's chest, but concluded this was not the cause of any infection, nor the cause of the decedent's death. Thus, the burden shifted to Click to offer evidence demonstrating a genuine issue of material fact for trial.

{¶20} It is well settled in Ohio that in order to prevail in a medical malpractice

claim, a plaintiff must demonstrate through expert testimony that, among other things, the treatment provided did not meet the prevailing standard of care.

{¶21} "Proof of the recognized standards must necessarily be provided through expert testimony. This expert must be qualified to express an opinion concerning the specific standard of care that prevails in the medical community in which the alleged malpractice took place, according to the body of law that has developed in this area of evidence." *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 102, 592 N.E.2d 828, quoting *Bruni* at 131-132.

{¶22} In this case, Click failed to produce any expert testimony that Georgopoulos breached the standard of care. Click argues here, as she did in the trial court, that expert testimony on negligence was unnecessary because the doctrine of *res ipsa loquitur* applies.

{¶23} The doctrine of *res ipsa loquitur* is a rule of evidence that allows the factfinder to draw an inference of negligence from the facts presented. *Cunningham v. Children's Hosp.*, 10th Dist. No. 05AP-69, 2005-Ohio-4284, at ¶25, *Johnson v. Hammond* (1988), 47 Ohio App.3d 125, 127, 547 N.E.2d 1004. To merit application of the rule "a plaintiff must adduce evidence in support of two conclusions: (1) that the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed." *Morgan v. Children's Hosp.* (1985), 18 Ohio St.3d 185, 187-188, 18 OBR 253, 480 N.E.2d 464, quoting *Hake v. Wiedemann Brewing Co.* (1970), 23 Ohio St.2d 65, 66-67, 52 O.O.2d 366, 262 N.E.2d 703. See, also, *Eannottie v. Carriage Inn of Steubenville*, 155 Ohio App.3d 57, 2003-Ohio-5310, 799 N.E.2d 189, at ¶42. Whether sufficient evidence exists to warrant the application of *res ipsa loquitur* is for the court's determination, as a matter of law. *Becker v. Lake Cty. Mem. Hosp. W.* (1990), 53 Ohio St.3d 202, 203, 560 N.E.2d 165.

{¶24} "Although the doctrine can be applied in medical-malpractice actions, it

generally does not obviate the requirement that a plaintiff provide expert testimony on the applicable standard of care." *Cook v. Toledo Hosp*, 169 Ohio App.3d 180, 2006-Ohio-5278, 862 N.E.2d 181, at ¶51. "Unless the negligence is apparent to laypersons, the plaintiff must present expert medical testimony to show that in the ordinary course of events the injury complained of would not have occurred if ordinary care had been observed." *Id.* See, also, *Bruni* at 130 (noting that where "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, * * * expert testimony is not necessary.")

{¶25} One example of where *res ipsa loquitur* could apply in a medical malpractice case to establish negligence without expert testimony is where metallic forceps are left inside of a patient's abdomen. *Melnyk v. Cleveland Clinic* (1972), 32 Ohio St.2d 198, 200, 61 O.O.2d 430, 290 N.E.2d 916 (holding that to "carelessly leave a large and obvious metallic forceps and a nonabsorbent sponge in a surgical patient's body is negligence as a matter of law.") In *Hayner v. Elder* (Aug. 3, 1976), 10th Dist. No. 76AP-134, the court found that *res ipsa loquitur* did not apply to the situation at hand, but gave the example of a doctor amputating the wrong leg as a situation where the doctrine would apply. *Id.* at *2.

{¶26} Turning to the present case, we conclude that a layperson could not necessarily deduce that leaving monofilament sutures and felt pledgets inside of the chest cavity is negligence absent some explanation from an expert. This situation is different from those where a limb is mistakenly amputated or where a large surgical instrument is left inside the patient. In other words, it does not take an expert to discern that negligence occurs when the wrong leg is amputated or a large forceps is left inside of a patient's abdomen. However, felt pledgets and monofilament sutures are more technical in nature, and understanding the use or misuse of them would require expert testimony. Thus, the doctrine of *res ipsa loquitur* did not obviate Click's duty to produce expert testimony demonstrating Georgopoulos's negligence.

{¶27} Even assuming *arguendo* that the doctrine of *res ipsa loquitur* applies in this

case and negligence can be presumed in the absence of expert testimony, Click's failure to produce evidence relating to proximate cause was fatal and supports the trial court's decision to grant summary judgment in Georgopoulos's favor.

{¶28} "The general rule, in medical malpractice cases, is that the plaintiff must prove causation through medical expert testimony in terms of probability to establish that the injury was, more likely than not, caused by the defendant's negligence." *Wilson v. Kenton Surgical Corp* (2001), 141 Ohio App.3d 702, 705, 753 N.E.2d 233, citing, *Roberts v. Ohio Permanente Med. Group, Inc.* (1996), 76 Ohio St.3d 483, 668 N.E.2d 480. Hence, to establish proximate cause, a plaintiff must introduce evidence demonstrating that it was a probability the doctor's alleged negligence of was the cause of the plaintiff's injury. *Wilson* at 705-706.

{¶29} Click offered no expert testimony demonstrating that it was a probability that Georgopolous's alleged negligence caused the decedent any injury. The autopsy report clearly states that the presence of the felt pledgets and monofilament sutures did not cause the decedent's demise. And Click presented no evidence in the form of expert testimony that those foreign bodies proximately caused any other injury. The autopsy report notes a "foreign body reaction," but states that no infection resulted. To survive summary judgment Click needed to provide some expert testimony relating to proximate cause, yet she failed to do so. See, e.g., *Taylor v. McCullough-Hyde Memorial Hosp.* (1996), 116 Ohio App.3d 595, 599-600, 688 N.E.2d 1078 (holding that because the plaintiff failed to produce any evidence that the defendants deviated from the standard of care or that any such deviation proximately caused any legally recognized injury the trial court did not err in granting summary judgment in favor of the defendants).

{¶30} Based on the foregoing, the trial court properly granted summary judgment in favor of Georgopoulos. Click's first assignment of error is meritless.

Dismissal with Prejudice

{¶31} In her second and final assignment of error Click asserts:

{¶32} "The trial court erred, to the detriment of Appellant, by dismissing this suit with prejudice."

{¶33} Click contends that even if the trial court properly granted summary judgment, the suit should have been dismissed without prejudice, instead of with prejudice. Click cites *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, in support of her argument.

{¶34} In *Fletcher*, the Court concluded that in a Civ.R. 12(B)(6) motion to dismiss based on the failure to attach an affidavit of merit to the complaint as required by Civ.R. 10(D)(2), the proper disposition is a dismissal without prejudice. *Id.* at paragraph two of the syllabus. The Court reasoned that a motion to dismiss for failure to state a claim "is a procedural tool testing the sufficiency of the complaint. * * * To put this in concrete terms, a dismissal for failure to state a claim is without prejudice except in those cases where the claim cannot be pleaded in any other way." *Id.* at ¶17 (internal citations omitted.) The Court held that the dismissal of the plaintiff's claim should have been without prejudice as it was not "on the merits" but rather went towards the sufficiency of the complaint, specifically, the complaint's failure to include an affidavit of merit. *Id.* at ¶18.

{¶35} In the present case, however, the trial court dismissed the suit pursuant to a motion for summary judgment, not a motion to dismiss, as in *Fletcher*. Unlike a dismissal for failure to state a claim pursuant to Civ.R. 12(B)(6), "[a] summary judgment pursuant to Civ.R. 56 is an adjudication on the merits that operates as a dismissal with prejudice." *Stuller v. Price*, 10th Dist. Nos. 02AP-29, 02AP-267, 2003-Ohio-583, at ¶23, quoting, *Cunningham v. A-Best Products Co.* (July 26, 1995), 4th Dist. Nos. 94CA29, 94CA32, 94CA30, 94CA33, 94CA31, at *5.

{¶36} Thus, *Fletcher* is factually distinguishable from the case at hand. The trial court properly dismissed Click's suit with prejudice, since the dismissal occurred as a result of summary judgment proceedings. Click's second assignment of error is meritless.

Conclusion

{¶37} Both of Click's assignments of error are meritless. The trial court properly granted summary judgment in Georgopoulos's favor, because Click failed to put forth evidence in the form of expert testimony showing that Georgopoulos was negligent or that Georgopoulos's alleged negligence proximately caused the decedent's death or other

injury. The trial court properly dismissed the case with prejudice since a Civ.R. 56(C) motion for summary judgment constitutes adjudication on the merits. Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.