

Cite as 2024 Ark. App. 227
ARKANSAS COURT OF APPEALS
DIVISION II
No. CV-22-396

SHERRI REGGANS

APPELLANT

V.

SCOTT SCHLESINGER, MD; AND
FREEWAY SURGERY CENTER, LLC
APPELLEES

Opinion Delivered April 3, 2024

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SEVENTEENTH DIVISION
[NO. 60CV-20-6340]

HONORABLE MACKIE M. PIERCE,
JUDGE

AFFIRMED

CINDY GRACE THYER, Judge

Sherri Reggans appeals a Pulaski County Circuit Court order granting summary judgment in favor of Scott Schlesinger, MD; and Freeway Surgery Center, LLC (collectively “Appellees”). On appeal, Reggans contends that Appellees failed to establish a prima facie entitlement to summary judgment; that there were genuine issues of material fact in dispute; and that summary judgment was premature.

This medical-malpractice action arose after Dr. Schlesinger performed a spinal fusion surgery on Reggans at Freeway Surgery Center in March 2017. Reggans claimed her condition began to worsen shortly after the surgery. She further claimed that she informed Dr. Schlesinger of her worsening symptoms, but he failed to take any action to address her concerns.

Approximately four months after the surgery, in August 2017, Dr. Schlesinger ordered an MRI. Reggans claimed that the MRI revealed that the pedicle screw Dr. Schlesinger used in her spinal fusion was malpositioned and was too long, resulting in the screw compressing her L5 nerve root. By her account, Dr. Schlesinger admitted that the screw was the cause of her declining physical health and advised that it needed to be removed immediately.

Dr. Schlesinger performed a second surgery in September 2017 to remove the offending pedicle screw. Reggans claims that, as a result of Dr. Schlesinger's actions, scar tissue formed around the nerve, which, in turn, caused a practically irreversible nerve condition. She claims his negligence has caused her to suffer from severe chronic pain in her lower back and extremities, pain in her left hip, spasms, carpal tunnel syndrome, and weakness in her upper extremities.

As a result of the foregoing, in March 2019, Reggans filed a medical-negligence action against Dr. Schlesinger and Freeway Surgery Center. That case was subsequently dismissed without prejudice pursuant to Rule 41 of the Arkansas Rules of Civil Procedure on November 7, 2019.

Reggans refiled her complaint for medical negligence¹ on November 9, 2020—the last day to file pursuant to the savings statute. Dr. Schlesinger and Freeway Surgery Center answered and generally denied the allegations of Reggans's complaint in February 2021.

¹She also brought a claim for breach of contract as to Freeway Surgery Center. Despite being couched as a contract claim, such a claim is still considered an action for medical

Appellees in this case moved for summary judgment on September 10, 2021. In support of their motion, Appellees attached the affidavit of Dr. Noojan Kazemi, a board-certified neurosurgeon with University of Arkansas for Medical Sciences. Dr. Kazemi testified that he had reviewed Reggans’s complaint and deposition as well as the medical records of Dr. Schlesinger and Freeway Surgery Center. Dr. Kazemi reviewed those materials and opined “within a reasonable degree of medical certainty, that there is no evidence whatsoever that Dr. Schlesinger or Freeway Surgery Center failed to comply with the applicable standard of care, or that any acts or omissions on their part proximately caused any injuries or damages” to Reggans. He further averred that, in his professional opinion, “within a reasonable degree of medical certainty, there is no evidence whatsoever that the persistence of [Reggans’s] subjective pain symptoms post-operatively were the result of negligence on the part of Dr. Schlesinger or Freeway Surgery Center.” He stated that “[s]uch symptoms are a known risk and complication of spinal surgery” that can and do occur “even

malpractice governed by the Arkansas Medical Malpractice Act. The Medical Malpractice Act applies to all causes of action for medical injury arising after April 2, 1979, including wrongful-death and survival actions arising from the death of a patient. *Epps v. Ouachita Cnty. Med. Ctr.*, 2021 Ark. App. 389, 636 S.W.3d 787. “Action for medical injury” means all actions against a medical-care provider, whether based in tort, contract, or otherwise, to recover damages on account of medical injury as defined in this section. Ark. Code Ann. § 16-114-201(1) (Repl. 2016). “Medical injury” or “injury” means any adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical-care provider to a patient or resident, whether resulting from negligence, error, or omission in the performance of such services. Ark. Code Ann. § 16-114-201(3). As a medical clinic, Freeway Surgery Center is considered a medical-care provider under the Act. *See* Ark. Code Ann. § 16-114-201(2), which includes clinics that provide medical care or medical services.

in the absence of negligence on anyone's part." He then stated that, in his professional opinion and again within a reasonable degree of medical certainty, Reggans's postoperative pain symptoms "could not have been predicted or prevented by Dr. Schlesinger or Freeway Surgery Center." Moreover, having reviewed the medical records, Dr. Kazemi attested that there was no deviation from the standard of care by Dr. Schlesinger or Freeway Surgery Center in connection with Reggans's care and treatment, and nothing they did or failed to do in connection with their care and treatment contributed, proximately or otherwise, to any of the injuries or damages alleged in Reggans's complaint.

On October 4, Reggans filed a motion for extension of time to file a response to the motion for summary judgment. In her motion for extension of time, Reggans informed the court that, due to her counsel's current caseload, additional time was needed to obtain further information and to prepare a response to the motion. She further informed the court that she was awaiting an expert opinion, which had been requested. She then requested an extension of time until October 11, 2021, to provide a response. Her request was granted.

On October 11, 2021, Reggans responded to the motion for summary judgment, denying that Appellees had established an entitlement to summary judgment and claiming that she had identified a physician expert to testify regarding the issue of medical malpractice; however, she stated she still needed additional time under Arkansas Rule of Civil Procedure 56(f) to gather evidence. She asserted that the deadline for the completion of discovery had yet to pass; that the timeline to disclose and provide the summary of expert opinions had

not passed; that the deadline for deposing expert witnesses had not passed; and that a trial date had not yet been set. She attached the affidavit of her counsel as required by Rule 56(f).

Appellees replied on October 28, asserting that Reggans had had sufficient time to develop or prosecute her case and yet still lacked the expert support necessary to create a genuine issue as to any material fact.

A hearing on the motion for summary judgment was held on December 3, 2021. At the hearing, Reggans continued to maintain, in part, that summary judgment was premature since discovery had not yet been completed, Appellees' expert witness had not been deposed, and Appellees had not provided all the imaging studies in discovery, which her expert had told her he needed to render his opinion. As such, a continuance was necessary to allow for further discovery.

After hearing arguments of counsel, the court granted an almost forty-five-day extension, until January 14, 2022, to allow counsel to complete any necessary discovery and to supplement Reggans's response. In doing so, the court noted the length of time since the initial filing of the complaint and stated that there had been adequate time to conduct discovery. The court warned counsel that if the requisite proof was not submitted by the deadline, the court would grant the motion.

On December 8, 2021, Reggans propounded requests for admissions to Dr. Schlesinger. One of the requests sought an admission that Dr. Schlesinger had in his possession, custody, or control medical records that were not produced to her. Dr. Schlesinger denied having possession, custody, or control of the records.

At approximately 8:30 p.m. on January 14, Reggans supplemented her response with the affidavit of Dr. Wade Jensen, an orthopedic surgeon; a letter from Appellees' counsel regarding Reggans's request for medical records;² and an affidavit from Reggans's counsel indicating that Appellees had failed to produce certain medical records during discovery and that these records were necessary for Reggans's expert to render an opinion in the matter. Counsel again requested that the summary-judgment motion be denied or that a decision on the motion for summary judgment be stayed until Appellees had produced all requested medical records and until depositions had been taken.

Dr. Jensen's affidavit noted that he is a "medical doctor and board-certified orthopedic surgeon."³ He stated that, in preparation for giving his medical opinion, he had reviewed the complaint, the billing records from Arkansas Neurosurgery Brain & Spine Clinic and Freeway Surgery Center; one hundred pages of records from Legacy Spine and Neurological Specialists; thirty-two pages of records from Legacy Surgery Center; imaging from Pavilion MRI; records from UAMS; and Dr. Schlesinger's discovery responses. Dr. Jensen stated that he had reviewed these records, and there was evidence that the left L5 pedicle screw "may" have been placed medial to the pedicle, thus impaling the L5 nerve root.

²The letter, dated January 12, specifically advised Reggans that she could request her own medical imaging records from the nonparty providers where they were created instead of relying on Appellees to provide them to her.

³The affidavit stated that Dr. Jensen's curriculum vitae (CV) was attached, but it was not. Reggans refiled Dr. Jensen's affidavit the next morning (after the response deadline) and attached his CV.

He stated that he would expect the misplaced pedicle screw to cause the L5 nerve symptoms Reggans experienced postoperatively. He opined that the failure to recognize the screw malposition and the delay in its removal “may” have fallen below the standard of care. Finally, he stated that he had not seen the interoperative or postoperative imaging and that he needed to do so in order determine if her injuries could have been avoided.

On January 18, 2022, after the court-imposed deadline for supplementation, Reggans moved to compel discovery, alleging that Appellees had intentionally omitted certain records from their production of documents—including the imaging that showed the misaligned position of the pedicle screw—and had claimed that the images were in the possession of a “nonparty” provider, Pavilion MRI—a company Reggans claims is controlled by Dr. Schlesinger.

On January 21, 2022, the circuit court granted Appellees’ summary-judgment motion, finding that Reggans had failed to supplement her response to the motion for summary judgment.⁴ Reggans timely moved for reconsideration, alerting the court to her timely response and again asking the court to deny the motion for summary judgment to allow time for additional discovery.

Appellees responded that Reggans had failed to object to the submission of the proposed order and waited ten days after its entry before objecting. Appellees further stated

⁴The proposed order signed by the court was prepared and submitted by appellee’s counsel prior to the time Reggans’s response was reflected in the court’s electronic file.

that, even with timely supplementation, Reggans had failed to include an affidavit from a qualified expert sufficient to rebut summary judgment.

Reggans's motion for reconsideration was deemed denied on March 2, 2022. She timely filed her notice of appeal on March 31, 2022.

I. *Standard of Review*

Our supreme court has held that when reviewing whether a motion for summary judgment should have been granted, we determine whether the evidentiary items presented by the moving party in support of the motion leave a material question of fact unanswered. *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000). All proof submitted must be viewed in the light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Id.* Summary judgment is no longer viewed by this court as a drastic remedy; rather, it is viewed simply as one of the tools in a circuit court's efficiency arsenal. *Smith v. Rogers Grp., Inc.*, 348 Ark. 241, 72 S.W.3d 450 (2002). It should be granted only when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Id.*

To establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant breached a standard of care, that damages were sustained, and that the defendant's actions were a proximate cause of those damages. *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997). Proximate causation is an essential element for a cause of action in negligence. *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996). Proximate cause is that which, in a natural and continuous sequence unbroken by any

efficient intervening cause, produces the injury and without which the result would not have occurred. *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 148 S.W.3d 754 (2004). This traditional tort standard requires proof that “but for” the tortfeasor’s negligence, the plaintiff’s injury or death would not have occurred. *Dodd v. Sparks Reg’l Med. Ctr.*, 90 Ark. App. 191, 204 S.W.3d 579 (2005).

Although proximate causation is usually a question of fact for a jury, where reasonable minds cannot differ, a question of law is presented for determination by the court. *Cragar v. Jones*, 280 Ark. 549, 660 S.W.2d 168 (1983). In medical-injury cases, it is not enough for an expert to opine that there was negligence that was the proximate cause of the alleged damages. *Kilgore, supra*. The opinion must be stated within a reasonable degree of medical certainty. *Id.* When a party cannot present proof on an essential element of his claim, the moving party is entitled to summary judgment as a matter of law. *Sanders v. Banks*, 309 Ark. 375, 830 S.W.2d 861 (1992). Additionally, we have held that a plaintiff’s failure to produce the requisite expert testimony demonstrates that no genuine issues of material fact exist and that the defendant is entitled to summary judgment as a matter of law. *Valentine v. White Cnty. Med. Ctr.*, 2020 Ark. App. 565, 6, 615 S.W.3d 729, 732 (2020)

II. *Arguments on Appeal*

On appeal, Reggans contends that Appellees failed to establish a prima facie entitlement to summary judgment; that there were genuine issues of material fact in dispute; and that summary judgment was premature. Because Reggans failed to submit the requisite expert medical testimony needed to defeat summary judgment, we affirm.

In medical-malpractice actions, unless the asserted negligence could be comprehended by a jury as a matter of common knowledge, a plaintiff has the additional burden of proving three propositions by expert testimony: the applicable standard of care; the medical provider's failure to act in accordance with that standard; and that the failure was the proximate cause of the plaintiff's injuries. Ark. Code Ann. § 16-114-206(a) (Repl. 2016).⁵ When the defendant demonstrates the plaintiff's failure to produce the requisite expert testimony, the defendant has demonstrated that no genuine issues of material fact exist and is therefore entitled to summary judgment as a matter of law. *Gonzales v. Cont'l Cas. Co.*, 2022 Ark. App. 501, 659 S.W.3d 277.

Here, Reggans did not argue that the asserted negligence could be comprehended by a jury as a matter of common knowledge, nor did she procure and produce an affidavit with the requisite expert testimony within the deadline set by the court. While she did present the affidavit of Dr. Wade Jensen in response to the motion for summary judgment by the response deadline, Dr. Jensen's affidavit falls short of providing the evidence necessary to support her claim.

First, Reggans did not timely produce evidence of Dr. Jensen's qualifications to provide an expert opinion in this matter. When a duly licensed and practicing physician has gained knowledge of the standard of care applicable to a specialty in which he is not directly

⁵The portion of this statute limiting expert opinions to medical-care providers of the same specialty as the defendant was held unconstitutional in *Broussard v. St. Edward Mercy Health Sys.*, 2012 Ark. 14, 386 S.W.3d 385.

engaged but as to which he has an opinion based on education, experience, observation, or association within that specialty, his opinion is competent. *Stewart v. Deaton*, 2021 Ark. App. 73, 618 S.W.3d 181. However, when a doctor's statements as to his qualifications are vague and conclusory, they fail to establish a sufficient familiarity with the particular field at issue by which to render an expert opinion. See *Stewart, supra*; *Dodd*, 90 Ark. App. at 199, 204 S.W.3d at 584 (citing *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989)).

Here, the affidavit Reggans filed at the eleventh hour on the evening of the response deadline simply stated that Dr. Jensen is a medical doctor and a board-certified orthopedic surgeon and that he is familiar with the standard of neurosurgical care in connection with the spinal fusion procedures performed by Dr. Schlesinger, a neurosurgeon. It provided no explanation as to how Dr. Jensen, an orthopedic surgeon, was knowledgeable by either training or experience as to the standard of care for neurosurgical patients. There was no information provided in the affidavit about his qualifications, education, or experience from which the circuit court could have concluded that he was a qualified medical expert. Thus, the timely filed affidavit is insufficient to establish that Dr. Jensen was qualified to render an expert opinion in this matter. See *Stewart, supra* (holding that the plaintiff's summary-judgment affidavit failed to prove physician was a qualified expert when it included only vague and conclusory statements regarding the physician's qualifications and failed to attach the physician's CV).

We acknowledge that the affidavit that was filed before the response deadline stated that Dr. Jensen's CV was attached thereto and that Dr. Jensen's CV provided a detailed

description of his education, training, and experience such that he may have been considered a qualified expert. Unfortunately, the CV was not actually attached to the affidavit as indicated and was not filed until the next day—after the response deadline. Accordingly, such qualification was untimely.

Second, even if Dr. Jensen’s CV had been timely filed and had established his qualifications, his affidavit fails to provide the requisite proof to overcome summary judgment. He stated that, according to his review of the medical records, the left L5 pedicle screw “may” have been placed medial to the pedicle, thereby impaling the L5 nerve root and that Dr. Schlesinger’s failure to recognize the screw malposition and delay in its removal “may” have fallen below the standard of care. He did not opine within a reasonable degree of medical certainty, as he must, that Dr. Schlesinger’s actions fell below the standard of care or that his failure was the proximate cause of Reggans’s injuries. Because Dr. Jensen’s affidavit does not provide the requisite proof necessary to defeat summary judgment, his claim fails. See *Ford v. St. Paul Fire & Marine Ins. Co.*, 339 Ark. 434, 5 S.W.3d 460 (1999) (affirming the grant of summary judgment in favor of a physician in a medical-malpractice case where the plaintiff failed to prove proximate cause by expert testimony stated within a reasonable degree of medical certainty).

Reggans argues, however, that she was prevented from supplying the requisite expert opinion because of the actions of the Appellees. She claims that the Appellees failed to provide in discovery the radiological imaging studies needed for her expert to form the basis of such an opinion. As a result, she asserts, the court should have granted a continuance to

complete discovery prior to ruling on the motion for summary judgment. Her argument again fails for two reasons—first, she failed to timely seek a motion to compel; and second, her reliance on Appellees to provide her with those medical records was misplaced.

Our law is well settled that a circuit court has broad discretion in matters pertaining to discovery, and the exercise of that discretion will not be reversed by this court absent an abuse of discretion that is prejudicial to the appealing party. *Bennett v. Lonoke Bancshares, Inc.*, 356 Ark. 371, 155 S.W.3d 15 (2004). In order for this court to reverse the circuit court’s denial of a continuance, the appellant must show that the circuit court abused its discretion and that the additional discovery would have changed the outcome of the case. *Vibo Corp. v. State ex rel. McDaniel*, 2011 Ark. 124, 380 S.W.3d 411. Under Arkansas Rule of Civil Procedure 56(f) (2023),⁶ the party opposing the motion for summary judgment is required to present an affidavit setting forth the problems the party is having gathering facts to support its opposition to summary judgment. *See id.*; *Jenkins v. Int’l Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994).

While the passage of time is not determinative, our supreme court has explained that it is a factor to be considered in these circumstances. *Jenkins, supra*. Here, Reggans initially filed her malpractice claims in March 2019 that arose from injuries she allegedly sustained

⁶“Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

in 2017. That complaint was dismissed without prejudice pursuant to Arkansas Rule of Civil Procedure 41 in November 2019. A year later, she refiled her malpractice action. The motion for summary judgment was not filed until September 2021—approximately four years from the date of the alleged injury, almost two and a half years from the filing of the initial complaint, and almost one year from the refiling of the complaint after dismissal.

Moreover, although her response to the motion was initially due on October 4, Reggans requested an extension of time in which to respond until October 11, which was granted. However, while Reggans timely filed a response on October 11, she did not file an opposing-medical-expert affidavit at that time. Instead, she requested that the circuit court deny the motion for summary judgment or, in the alternative, that she be granted additional time to complete further discovery and to incorporate any findings into a subsequent response. Her request for additional time was again granted, and she was given a final January 14, 2022 deadline to file her supplemental response. Thus, by the time her response was filed, litigation on her claims had been ongoing for over three years, and she had had almost four months from the date the Appellees filed their motion for summary judgment to obtain the necessary medical records or to file a motion to compel. Yet, she did not do so. In fact, she did not even file her motion to compel until after the response deadline. Given the lengthy timeline of this dispute and the fact that the circuit court had twice granted Reggans a continuance to collect the necessary information, we conclude that the circuit court did not abuse its discretion in denying her request for a continuance pursuant to Rule 56(f).

Additionally, the medical records Reggans claims were not produced by Appellees were readily available to her without having to rely on Appellees for their production.

Arkansas Code Annotated section 16-46-106 specifically states:

In contemplation of, preparation for, or use in any legal proceeding . . . a person who is or has been a patient of a medical provider is entitled to obtain access, personally or through another person authorized to request the patient's medical records, to the patient's medical records, through a written request, and shall be furnished copies of all requested medical records after paying the relevant expense as provided in this section.

Ark. Code Ann. § 16-46-106(a). Thus, nothing prevented Reggans from requesting her own medical records and imaging directly from the actual providers: here, Pavilion MRI.

Furthermore, Reggans has failed to adequately explain how she was prejudiced by the court's denial of her continuance motion. The only medical records Reggans claims to be missing are the radiological images themselves. Dr. Jensen, who is not a radiologist, has access to the radiology reports relied on by Dr. Schlesinger in his treatment of Reggans, and those reports were read, presumably, by a radiologist. Thus, unless Dr. Jensen is also qualified to opine on the accuracy (or inaccuracy) of the radiologist's reports, it is unclear how his opinion would be changed by having the actual imaging.

To recap, Appellees established a prima facie entitlement to summary judgment when they submitted the affidavit of Dr. Kazemi, who opined within a reasonable degree of medical certainty that Dr. Schlesinger's actions had not fallen below the standard of care and were not the proximate cause of her subjective complaints of pain or her injuries. Once a moving party has established a prima facie entitlement to summary judgment, the opposing party

must meet proof with proof and demonstrate the existence of a material issue of fact. *Magrans v. Andrada*, 2021 Ark. App. 35, 616 S.W.3d 668. At that point, the respondent must discard the shielding cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact. *Id.* Reggans failed to do so. Instead, she alleges that she has an expert who is “willing and *nearly ready*” to testify about the standard of care, proximate cause, and negligence of the Appellees; that the Appellees are withholding information her expert needs to complete his testimony; and that the expert witness lacks sufficient information to adequately form an opinion about the facts of the case. (Emphasis added.) This is simply insufficient, and under these circumstances, we cannot say that the circuit court abused its discretion in granting summary judgment, and we affirm on this point on appeal. *Alexander v. E. Tank Servs., Inc.*, 2016 Ark. App. 185, 486 S.W.3d 813. Because we find that summary judgment was appropriate as a result of Reggans’s failure to produce the required expert testimony, we need not address her other arguments on appeal.

Affirmed.

HARRISON, C.J., and GLADWIN, J., agree.

Maximillan R. X. Sprinkle, for appellant.

Hall Booth Smith, P.C., by: *Jason B. Hendren* and *Joseph C. Stepina*, for appellees.