

88-LW-1008 (10th)

Cindy Lou HOLLEY, Plaintiff-Appellant,

v.

Patrick J. STILLISANO, Defendant-Appellee.

No. 87AP-1031.

10th District Court of Appeals of Ohio, Franklin County.

Decided on March 31, 1988.

Appeal from the Franklin County Court of Common Pleas.

John E. Palcich, for plaintiff-appellant.

Messrs. Porter, Wright, Morris & Arthur, Craig D. Barclay and Terri-Lynne B. Smiles, for defendant-appellee.

OPINION

WHITESIDE, Presiding Judge.

Plaintiff, Cindy Lou Holley, appeals from a decision of the Franklin County Court of Common Pleas and raises one assignment of error as follows:

"The trial court committed prejudicial error in rendering a summary judgment for the Defendant and against the Plaintiff on the basis that Plaintiff had not presented expert testimony other than the cross-examination of the Defendant himself in support of plaintiff's complaint."

On July 31, 1985, plaintiff went to the office of defendant, Dr. Patrick J. Stillisano, to have her teeth cleaned. Prior to the cleaning of her teeth by a dental hygienist under the supervision of defendant, plaintiff was given Novocaine. During the cleaning, plaintiff's jaw locked, leaving her mouth wide open. The hygienist immediately summoned defendant. He attempted three times to reposition plaintiff's jaw, allegedly using a technique learned in dental school. After his failure to unlock plaintiff's jaw, defendant contacted an oral surgeon and sent plaintiff by herself, with her jaw locked open, to see the oral surgeon, who was able to unlock plaintiff's jaw on the first try without pain or difficulty. Plaintiff brought this action for malpractice. Discovery was conducted through depositions and interrogatories. Defendant filed a motion for summary judgment. The predicate for defendant's motion is that plaintiff cannot prevail on the merits since plaintiff would not present expert testimony at the trial, and such expert testimony is necessary for plaintiff to carry the burden of proving a recognized standard of care and to show that defendant negligently departed from that standard. The trial court rendered summary judgment in favor of defendant holding that expert testimony was necessary to plaintiff's case to rebut defendant's contention that he met the requisite standard of care.

Plaintiff contends that it was improper for the trial court to grant summary judgment to defendant because there exists a genuine issue of fact.

Civ.R. 56(C) provides in pertinent part that:

" * * * Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come but to one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. * * * "

The Ohio Supreme Court in Norris v. Ohio Std. Oil Co. (1982), 70 Ohio St.2d 1, comments that summary judgment is

a procedural device to terminate litigation and to avoid a formal trial. However, the court noted that "[i]t must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion."

In State v. Licsak (1974), 41 Ohio App.2d 165, this court stated that, in order to prevail on summary judgment, the moving party (in this case the defendant) has the burden of showing that no genuine issue exists as to any material fact. At trial, in order to defeat a motion for a directed verdict under Civ.R. 50(A), plaintiff will have the burden of showing, by a preponderance of the evidence, that the injury complained of was caused by defendant's doing some particular thing or things that a dentist of ordinary skill, care and diligence would not have done under like or similar circumstances, and that the injury complained of was a direct result of such act or omission. Moreover, proof of the recognized dental standard must necessarily be provided through expert testimony, unless the nature of the lack of skill or care is so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand it and to judge it. However, unlike the case of Bruni v. Tatsumi (1976), 46 Ohio St.2d 127, which was an appeal by the plaintiff following a motion for a directed verdict, in the case herein, the defendant, in order to prevail on a motion for summary judgment, has the burden of showing no genuine issue of fact. The defendant has not successfully carried that burden.

Plaintiff, by affidavit, interrogatories, and her own deposition testimony, stated that the defendant tried unsuccessfully three times to correct the problem of the locked jaw and, by doing so, created great pain and misalignment of the jaw. Of apparent necessity, plaintiff found her own way to the office of the oral surgeon recommended by defendant, who immediately, without medication, painlessly unlocked her jaw. There is conflicting testimony as to whether the defendant declined to assist plaintiff to drive to the office of the oral surgeon or whether plaintiff refused defendant's assistance.

Defendant, by deposition, stated that he had been trained in dental school to treat a locked jaw, but after trying unsuccessfully to unlock plaintiff's jaw, he sent plaintiff to see an oral surgeon who could administer a relaxant and unlock the jaw. Defendant, by affidavit, said that he is aware of the standard of care required of the dentist in unlocking the jaw and that he fully met the "standard of care for an ordinarily skillful dentist under all the circumstances," but does not explain why he was unsuccessful after three attempts to accomplish what the oral surgeon immediately accomplished without administering medicine or causing pain to the patient. Although defendant's self-serving opinion may be sufficient for a directed verdict where the plaintiff has the burden of proof and has not presented expert testimony, it is not sufficient for defendant to prevail on a motion for summary judgment because it demonstrates the existence rather than the absence of a genuine issue of fact under the circumstances. Thus, there is a genuine issue of fact.

Defendant, by his own admission, attempted to release plaintiff's jaw three times but was not successful. The oral surgeon effortlessly and painlessly immediately corrected the problem without medication. Defendant was his own expert witness, and only by affidavit (which unlike his deposition is untested by an opportunity to cross-examine the defendant), did defendant opine that he met the applicable standard of care. This self-serving opinion of defendant does not preclude a genuine issue of fact as to whether defendant acted with the necessary standard of care in light of his deposition testimony that he tried three times and failed, and in light of plaintiff's deposition that the other doctor used a different technique and easily succeeded on the first attempt, causing no pain. Expert testimony is not necessary to rebut, for summary judgment purposes, a self-serving conclusionary opinion expressed by one party, which opinion leaves unexplained how the situation that occurred could take place if defendant used the proper care. In other words, defendant has not explained conclusively why his ability to unlock plaintiff's jaw should be any less that of the oral surgeon. Additionally, plaintiff's testimony indicates the oral surgeon used a slightly different technique, but defendant's opinion and testimony suggests there is only one proper technique.

In light of the foregoing, plaintiff's assignment of error is sustained, the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to the trial court for further consideration in accordance with law consistent with this opinion.

Judgment reversed and cause remanded.

MCCORMAC and YOUNG, JJ., concur.