IN THE COURT OF APPEALS OF TENNESSEE

DONALD SHERMAN BRYANT,	)	C/A NO. 03A01-9603-CV-00105
	)	BLOUNT COUNTY CIRCUIT COURT
Plaintiff-Appellant,	)	
	)	
	)	
	)	
v.	)	HONORABLE W. DALE YOUNG,
	)	JUDGE
	)	
	)	
	)	
JACK T. BAUGUSS, JR.,	)	
	)	
Defendant-Appellee.	)	AFFIRMED AND REMANDED

KEVIN W. SHEPHERD, Maryville, for Appellant

STEPHEN C. DAVES of O'NEIL, PARKER & WILLIAMSON, Knoxville, for Appellee

OPINION

Susano, J.

This is a malpractice action brought against a dentist

who specializes in periodontics.[1] The plaintiff, Donald Sherman Bryant, alleges that the defendant, Dr. Jack T. Bauguss, Jr., committed malpractice when he used an improper, but otherwise unidentified, surgical instrument in performing oral surgery on him. He claims that a portion of his face is permanently numb as a result of the malpractice. He also alleges that Dr. Bauguss failed to fully inform him of the risks attendant to the surgery. Dr. Bauguss filed a motion for summary judgment supported by his affidavit in which he denied any deviation from the recognized standard of acceptable professional practice. Bryant responded by filing his own affidavit and that of Dr. Louis Altshuler, an oral surgeon from the St. Louis, Missouri area. The trial court found that the affidavits filed by the plaintiff failed to create a genuine issue of material fact on the relevant issues. The court concluded that the undisputed facts showed that Dr. Bauguss was entitled to a judgment as a matter of law. Consequently the court entered summary judgment for the defendant. Bryant appealed. He contends on appeal that Dr. Bauguss is not entitled to summary judgment. We affirm.

I

As previously noted, Bryant alleges that Dr. Bauguss

[1]Periodontics is "a branch of dentistry that deals with diseases of the supporting and investing structures of the teeth." ***Webster's Ninth New Collegiate Dictionary*** (1986), p. 875.

used an improper surgical tool;[2] and that as a proximate result of this act of malpractice, he sustained "a permanent condition of numbness" to a portion of his face. Bryant further alleges that he did not give informed consent to the surgery. Dr. Bauguss in his affidavit controverts the allegations of the complaint. He states that he is familiar with the standard of acceptable periodontal practice in the Blount County community, that he did not deviate from that standard, and that "the injury alleged in this case . . . was not caused by any negligence or malpractice on my part." Regarding informed consent, he states, "[i]t is further my opinion within a reasonable dental certainty that the rare potential for nerve injury in this procedure does not require description of this complication in obtaining informed consent."

As previously noted, Bryant counters Dr. Bauguss' affidavit with Dr. Altshuler's affidavit which states, in its entirety, as follows:

> 1. Attached is a copy of my curriculum vitae, which is incorporated herein by reference. I have the education and experience to state, as a medical expert, the following observations and opinions.
>
> 2. I have received the available records of Dr. Jack Bauguss, Jr. in his treatment of Donald Bryant on and after November 29, 1993.

[2]While the plaintiff alleges that Dr. Bauguss failed to us the proper tool in performing the surgery, he has not provided us with any proof of (1) the name of the tool that was used, or (2) the identity of the tool that should have been used. Apparently, the defendant's discovery deposition was not taken in this case.

> 3. A preliminary review of the records and x-rays indicated that there was nerve damage following the amputation of the distal root of a lower molar tooth in Mr. Bryant's jaw, to an extent not common or expected in this type of surgery. Prior to the surgery, Dr. Bauguss recorded that he was not sure he would be able to amputate the root successfully.
>
> 4. The record is very meager regarding the actual procedure and there was no record in the chart addressing a discussion of any details of the proposed surgery, what alternatives there were or any complications that could follow or result from the surgery.
>
> 5. Dr. Bauguss was aware that endodontic treatment following a root amputation was indicated, but the endodontia was not accomplished until months later.
>
> 6. Following my review of the available records, my opinion, based on a reasonable medical and dental certainty, is that the standard of care expected of a qualified, licensed dentist was not met by Dr. Bauguss in his treatment of Mr. Bryant.

II

Our standard of review in a summary judgment case is well-defined. In deciding whether a grant of summary judgment is appropriate, we must determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56.03, Tenn. R. Civ. P. We are required to take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable

inferences from that evidence in his or her favor, and discard all countervailing evidence. *See* ***Byrd v. Hall,*** 847 S.W.2d 208, 210-11 (Tenn. 1993).

Summary Judgment is generally not appropriate in malpractice cases. ***Bowman v. Henard,*** 547 S.W.2d 527, 530 (Tenn. 1977). This is because in most of these cases the facts are usually disputed, sometimes sharply so; however, in an appropriate case, summary judgment is the proper relief. *See*, e.g., ***Ayers v. Rutherford Hospital, Inc.***, 689 S.W.2d 155 (Tenn.App. 1984); ***Dolan v. Cunningham***, 648 S.W.2d 652 (Tenn.App. 1982). A plaintiff, in resisting a properly supported motion for summary judgment, does not have to fully prove his or her case in order to be successful at this pre-trial stage. Such a party must only demonstrate, generally by expert testimony, that there are disputed material facts as to each of the controverted elements of the cause of action.[3] In ***Schaefer v. Larsen,*** 688 S.W.2d 430 (Tenn.App. 1984), this court stated the applicable principle:

> In order to withstand a defendant's motion for summary judgment, the plaintiff does not have to "show" breach and causation in the sense of proving those elements, but must simply establish by competent means that there is a dispute over those material issues of fact raised by the record.

[3]However, even if the facts are undisputed, a plaintiff can successfully resist a motion for summary judgment if the facts do not show that the defendant is entitled to judgment as a matter of law. Rule 56.03, Tenn. R. Civ. P.

Id. at 432. The law in Tennessee, however, has also consistently recognized that

> [w]hile motions for summary judgment are generally inappropriate in professional malpractice cases, if the only issue is one which requires expert testimony and there is no expert response to an affidavit by an expert, then summary judgment is proper.

Gambill v. Middle Tenn. Med. Center, Inc., 751 S.W.2d 145, 146 (Tenn. App. 1988); ***Bowman,*** 547 S.W.2d at 530-31.

III

Our analysis of this case begins with an examination of the provisions of Tennessee's malpractice statutes. The elements of a malpractice claim, and the plaintiff's burden of proof with respect to those elements, are codified at T.C.A. § 29-26-115:

> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which he practices or in a similar community at the time the alleged injury or wrongful action occurred;
>
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
>
> (3) As a proximate result of the defendant's

> negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.
>
> (b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a) unless he was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make his expert testimony relevant to the issues in the case and had practiced this profession or specialty in one of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection when it determines that the appropriate witnesses otherwise would not be available.

The Supreme Court has stated the following in construing this statute:

> We see no ambiguity or lack of clarity in the dictates of T.C.A. Sec. 29-26-115. It provides unequivocally that each of the three basic elements of a medical malpractice action--the standard of care, the breach of the standard, and proximate cause--be proven by testimony of experts who were licensed and practicing in Tennessee or a contiguous bordering state during the year preceding the date that the alleged injury or wrongful act occurred.

Payne v. Caldwell, 796 S.W.2d 142, 143 (Tenn. 1990).

In moving for summary judgment in a malpractice case, a defendant must present facts refuting the operative allegations

of the plaintiff's complaint as to at least one of the three elements enumerated in the statute. ***White v. Methodist Hosp. South,*** 844 S.W.2d 642, 648 (Tenn.App. 1992). Dr. Bauguss' affidavit addresses all three. He states, as noted earlier, that he is familiar with the local standard of care, that he did not breach that standard in any way, and that Bryant's condition was not proximately caused by any negligence on his part.

In resisting Dr. Bauguss' motion, Bryant relies primarily on Dr. Altshuler's affidavit. He argues that this affidavit negates the defendant's affidavit. We disagree. Dr. Altshuler does not state that he is familiar with the recognized standard of acceptable periodontal practice in Blount County or a similar community. Bryant recognizes this deficiency but contends that since Dr. Altshuler states that "the standard of care expected of a qualified, licensed dentist was not met by Dr. Bauguss," it can be inferred that Dr. Altshuler knows the standard of care in a community such as Blount County. Again, we disagree. The statute, T.C.A. § 29-26-115, clearly requires the plaintiff to affirmatively prove the recognized standard of acceptable professional practice "in the community in which [the defendant] practices or in a similar community." We cannot assume that Dr. Altshuler--who does not practice in Blount County--knows the standard of professional care in the Blount County area or in a similar community. Dr. Altshuler's statement--that Dr. Bauguss did not measure up to the "standard of care expected of a qualified licensed dentist"--does not

permit us to make the "leap of faith" urged by the plaintiff. The statement quoted from Dr. Altshuler's affidavit begs the question. What is the locale of the standard to which Dr. Altshuler makes reference? We do not know the answer to this question from his affidavit. This deficiency is fatal to the plaintiff's claim of malpractice.

Pertinent Tennessee caselaw is clear in requiring expert testimony on all three elements of the statute, including knowledge of the relevant standard of professional care. *See, e.g.*, ***Payne,*** 796 S.W.2d at 143. Further, the cases that deal with the issue of a medical expert's familiarity (or lack thereof) with local standards of practice clearly imply that the assumption suggested by the plaintiff is one that we cannot make. *Cf.* ***Ayers,*** 689 S.W.2d 155; ***Cardwell v. Bechtol,*** 724 S.W.2d 739, 754 (Tenn. 1987) (affirming directed verdict for defendant where no admissible evidence on local standard of care was presented)***;*** ***Osler v. Burnett,*** No. 02A01-9202-CV-00046, 1993 WL 90381 (Tenn.App., W.S., filed March 30, 1993, Crawford, J.); ***Moore v. Walwyn,*** No. 01A01-9507-CV-00295, 1996 WL 17143 (Tenn.App., filed Jan. 19, 1996, Lewis, J.); ***Roddy v. Volunteer Med. Clinic, Inc.,*** No. 03A01-9506-CV-00194, 1996 WL 79487 (Tenn.App., filed Feb. 26, 1996, Sanders, J.).

Although we have concluded that the malpractice statutes and relevant caselaw do not allow us to assume that Dr. Altshuler knows the appropriate standard of care, we must go

further. This is because Bryant's own affidavit presents the issue of whether the relevant standard has been effectively established by comments allegedly made by Dr. Bauguss in Bryant's presence. The Supreme Court has held that "the standard of care may be established by the defendant's own admissions. . ." ***Cardwell***, 724 S.W.2d at 754; ***Tutton v. Patterson***, 714 S.W.2d 268, 270 (Tenn. 1986). Bryant has sworn to the following in his affidavit:

> While Dr. Bauguss was performing surgery upon me, he commented in my presence to his assistant that he needed a smaller tool in order to properly perform the surgery. He stated that he looked diligently for such a tool, but none was immediately available, so he preceded [sic] with the surgery anyway.

We accept this statement as true for summary judgment purposes.[4] Dr. Bauguss does not specifically deny making this statement in his affidavit, nor does he discuss the surgical instruments used by him in the course of the surgery. He instead relies upon his general denial of any and all negligence in his affidavit.

The "admission" relied upon by the plaintiff is of no avail to him. There is no expert testimony before us that the use of the "tool," otherwise unidentified, employed by Dr. Bauguss constitutes a deviation from the "recognized standard of acceptable professional practice." We cannot find a deviation

---

[4] "The evidence offered by the nonmoving party must be taken as true." ***Byrd***, 847 S.W.2d at 215.

based on Bryant's affidavit,[5] and the subject is not addressed in Dr. Altshuler's affidavit.

IV

The affidavits submitted by the plaintiff are also deficient on the required element of proximate cause. Dr. Altshuler's affidavit is entirely silent on this issue. The malpractice statutes are clear that a plaintiff must provide competent expert medical testimony proving that "[a]s a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred." T.C.A. § 29-26-115(a)(3). Generally speaking, applicable Tennessee caselaw requires expert testimony on the issue of proximate cause. ***Bowman,*** 547 S.W.2d at 530-31 ("It is the established law in Tennessee that malpractice actions involving issues of . . . proximate cause require expert testimony. . ."); ***Dolan,*** 648 S.W.2d at 654 ("In medical malpractice cases causation is generally a matter requiring expert testimony.").

Once a defendant has filed a properly supported motion for summary judgment, the failure of the plaintiff to raise an issue of material fact regarding the proximate cause of the plaintiff's injuries renders his or her case ripe for summary

[5]The affidavit of an individual cannot be used to prove an expert opinion outside the affiant's field of competency. ***Bowman***, 547 S.W.2d at 531.

judgment. The ***Dolan*** court stated the following on this point:

> The rule requires, in the final analysis, that plaintiffs in malpractice actions must come forward. . .with expert opinion on the issues of negligence and proximate cause to make out a genuine issue of material fact, or face the likelihood of summary judgment in favor of the defendants. . .Our examination of the record reveals no expert testimony establishing a causal connection between the alleged negligence of the treating physician and the ultimate cause of death.

Dolan, 648 S.W.2d at 653-54. The ***Dolan*** court affirmed a grant of summary judgment to the defendant. *Id. See also* ***Hall v. Ramos,*** No. 01A01-9007-00261, 1991 WL 27372 (Tenn.App., M.S., filed March 6, 1991, Cantrell, J.) (affirming summary judgment because plaintiffs failed "to come forward with proof showing a genuine issue on the question of causation.").

Since Bryant's proof has failed to create a genuine issue of fact on causation, this is another reason why we must affirm the trial court's grant of summary judgment as to the plaintiff's cause of action for malpractice.

V

Finally, we turn to Bryant's other claim--that Dr. Bauguss performed surgery on him without his informed consent. Bryant's affidavit contains the following statement:

> In my Complaint I allege that Dr. Bauguss failed to provide me with the proper informed consent. This Complaint was not addressed in his Affidavit. Standing alone, that Complaint in and of itself is enough to justify the denial of Summary Judgment on the behalf of the Defendant. It is my testimony that Dr. Bauguss failed to inform me of the possible conflicts [sic] or of the possible complications and problems which could occur as a result of the surgery.

Bryant's statement that the informed consent claim "was not addressed in [Dr. Bauguss'] Affidavit" overlooks the following statement in that affidavit:

> It is further my opinion within a reasonable dental certainty that the rare potential for nerve injury in this procedure does not require description of this complication in obtaining informed consent.

Bryant's expert, Dr. Altshuler, did not address whether Dr. Bauguss should have advised the plaintiff that numbness of the face might result from the surgery. Even if he had, his failure to indicate that he was aware of the relevant standard of acceptable professional practice would have rendered his testimony inadmissible and hence not subject to consideration in

this case.

The malpractice statutes again provide guidance for the determination of this issue. T.C.A. § 29-26-118 states as follows:

> In a malpractice action, the plaintiff shall prove by evidence as required by § 29-26-115(b) that the defendant did not supply appropriate information to the patient in obtaining his informed consent (to the procedure out of which plaintiff's claim allegedly arose) in accordance with the recognized standard of acceptable professional practice in the profession and the specialty, if any, that the defendant practices in the community in which he practices and in similar communities.

Thus, by its clear terms, the statute requires expert testimony on the relevant standard of care in providing "appropriate information" for informed consent. In ***German v. Nichopoulos,*** 577 S.W.2d 197 (Tenn.App. 1978), the court stated the following on informed consent:

> Liability predicated on the doctrine of informed consent. . .is predicated upon negligence of the physician in the failure to reasonably advise the patient regarding the treatment recommended. The necessary result of that failure is that any consent given by the patient for that treatment is said to be without an informed or knowledgeable consent. . . . However, in order to recover under this theory in a medical malpractice case, there must be some medical testimony as to the usual and customary advice given to patients to procure consent in similar situations.

* * * *

> There is simply no competent proof that presents any jury issue. Counsel insists that simply because plaintiff testified that no one told her of any possible risks prior to receiving the injection, a Prima facie case based on lack of informed consent was made out. We disagree and hold, as did the Middle Section of this Court in an unreported case, that, in matters of informed consent the plaintiff has the burden of proving by expert medical evidence, (a) what a reasonable medical practitioner of the same or similar communities under the same or similar circumstances would have disclosed to the patient about attendant risks incident to a proposed diagnosis or treatment and (b) that the defendant departed from the norm.

German, 577 S.W.2d at 202, 204; ***Cardwell,*** 724 S.W.2d at 750. The reason for the rule requiring expert testimony is obvious: courts, lacking the benefit of medical training, have no way of knowing what information customarily should be transmitted to a patient in order to allow him or her to make an informed decision about a medical procedure. Dr. Bauguss has sworn that the condition of which Bryant complains is so "rare" as not to require disclosure for informed consent. Bryant did not controvert this assertion through expert testimony, as required by the statute and relevant caselaw.

Bryant points out that Dr. Bauguss' affidavit fails to state that he advised Bryant of *any* risks associated with the surgery. He seems to argue that this failure in some way renders the defendant's motion as to the informed consent issue inadequate. The answer to this contention is that failure to

inform a patient of a risk that does not ripen into a condition as a result of the surgery is immaterial as to whether informed consent was given. In such a situation, no injury equals no cause of action. The critical question is what, if anything, was required to be said, and what was said, about the condition that *did* result from the surgery.

Summary judgment against the plaintiff on the informed consent issue was proper.

For the aforementioned reasons, the judgment of the trial court is affirmed and this case is remanded for collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed and assessed to appellant.

_____
Charles D. Susano, Jr., J.

CONCUR:

_____
Houston M. Goddard, P.J.

_____
Herschel P. Franks, J.