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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA09-1124

	Opinion Delivered SEPTEMBER 29, 2010
DR. MARC ROGERS APPELLANT	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT, [NO. CV2008-236-III]
V.	HONORABLE JOHN S. PATTERSON, JUDGE
ALAN SARGENT APPELLEE	REVERSED AND REMANDED

M. MICHAEL KINARD, Judge

This is a medical malpractice case. Appellant Marc Rogers, M.D., brings this appeal from the order of the Garland County Circuit Court denying his motion for a new trial. On appeal, Rogers argues that the circuit court erred in granting partial summary judgment in favor of appellee Alan Sargent on the issue of liability because a jury question was presented. We agree and reverse and remand for a new trial.

Dr. Rogers performed gallbladder surgery on Sargent on November 13, 2001. At the conclusion of the surgery, the nurses assisting Dr. Rogers reported that the sponge-and-instrument count was correct. Almost two years later, Sargent returned to Dr. Rogers complaining of abdominal pain. Rogers performed a second surgery and removed a surgical sponge from Sargent's abdomen that was placed there during the 2001 surgery.

Sargent brought suit against Rogers, Dr. Gary Meek, and the nurses that assisted Dr. Rogers during the surgery alleging medical malpractice.[1] In an amended complaint, Sargent asserted that the doctrine of res ipsa loquitur applied. Dr. Rogers denied that he was negligent in his treatment of Sargent. In his amended answer to Sargent's amended complaint, Rogers asserted the affirmative defenses that Sargent's injuries were caused by persons not parties to the suit and that there was an intervening cause that independently injured Sargent.

Prior to trial, Sargent filed a Motion for Partial Summary Judgment, alleging that Rogers was liable as a matter of law. In his brief in support of the motion, Sargent relied upon the supreme court's decision in *Spears v. McKinnon*, 168 Ark. 357, 270 S.W. 524 (1925), which contains the following language:

> Probably the most common instance of malpractice which is brought into the courts arises out of surgical cases where the physician or attendant has left a sponge in the wound after the incision has been closed. That this is plainly negligence there is no doubt at all, and it matters not at all that many physicians testify that the best of surgeons sometimes leave a sponge or some other foreign substance in the bodies of their patients, for this is testimony merely to the effect that almost everyone is at times negligent. Whether the particular act was negligent is for the jury to decide, after considering the circumstances of the case. Surgeons cannot relieve themselves from liability for injury to a patient caused by leaving a sponge in the wound, after an operation, by the adoption of a rule requiring the attending nurse to count the sponges used and removed, and relying on such count as conclusive that all sponges have been accounted for.

168 Ark. at 363, 270 S.W. at 526 (quoting 21 R. C. L. *Physicians and Surgeons* § 33 at 388 (1918)).

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[1]The claims against the nurses were later dismissed as barred by the statute of limitations.

In opposition to the motion, Dr. Rogers submitted the affidavit of Dr. Kelly Mahone, a surgeon familiar with the standard of care of a general surgeon practicing in Hot Springs or a similar locality. Dr. Mahone opined that there was no evidence that Dr. Rogers deviated from the applicable standard of care in relying on multiple "correct" sponge counts from the nurses assisting him during the surgery. Mahone also stated that Dr. Rogers would not have been required to search for foreign objects in Sargent's abdominal cavity unless there was an incorrect sponge count or Sargent experienced postoperative symptoms or complications suggesting the presence of a foreign object, which, according to Mahone's review of Sargent's medical records, did not occur. Further, the sponge was located in a relatively inaccessible region of Sargent's abdomen and, according to Mahone, would likely not have been visible to Dr. Rogers as he performed the surgery.

The circuit court ruled from the bench and granted the motion for partial summary judgment. Dr. Rogers filed a motion to reconsider, asserting that the supreme court in *Spears*, *supra*, did not impose strict liability on surgeons for leaving a sponge in the patient. The circuit court denied the motion to reconsider. Sargent voluntarily dismissed the claims against Dr. Meek, and the case proceeded to trial only on the issue of damages. The jury awarded Sargent $100,000. Rogers filed a motion for a new trial, arguing that the court improperly granted Sargent's motion for partial summary judgment as to liability. The court denied the motion, and Dr. Rogers appeals.

On appeal, Dr. Rogers argues that Sargent failed to show that there was no genuine issue of material fact. He also argues that Arkansas has not adopted a rule of strict liability in retained foreign-object cases. Finally, he argues that a rule imposing an absolute duty of surgeons to remove all foreign objects is inconsistent with Arkansas law.

Under Arkansas law, the burden of proof for a plaintiff in a medical malpractice case is fixed by statute. *See* Ark. Code Ann. § 16-114-206. The statute requires that, in any action for a medical injury, expert testimony is generally necessary regarding the skill and learning possessed and used by medical care providers engaged in that speciality in the same or similar locality. *See Young v. Gastro-Intestinal Ctr., Inc.*, 361 Ark. 209, 205 S.W.3d 741 (2005); *Williamson v. Elrod*, 348 Ark. 307, 72 S.W.3d 489 (2002). There is, however, an exception to the requirement for expert testimony when the asserted negligence falls within the comprehension of a jury of laymen. Specifically, the statute provides as follows:

> (a) In any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving:
>
> (1) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality;
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> (2) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant that the medical care provider failed to act in accordance with that standard; and

> (3) By means of expert testimony provided only by a qualified medical expert that as a proximate result thereof the injured person suffered injuries that would not otherwise have occurred.

Ark. Code Ann. §16-114-206(a) (Repl. 2006). The Arkansas Supreme Court discussed this "common knowledge exception" in *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996), as follows:

> The necessity for the introduction of expert medical testimony in malpractice cases was exhaustively considered in *Lanier v. Trammell*, 207 Ark. 372, 180 S.W.2d 818 (1944). There we held that expert testimony is not required when the asserted negligence lies within the comprehension of a jury of laymen, such as a surgeon's failure to sterilize his instruments or to remove a sponge from the incision before closing it. On the other hand, when the applicable standard of care is not a matter of common knowledge the jury must have the assistance of expert witnesses in coming to a conclusion upon the issue of negligence.

Haase, 323 Ark. at 269, 915 S.W.2d at 678. Placing a surgical sponge in a patient's incision and failing to remove it when surgery is completed is an obvious act of negligence that a jury can determine without expert testimony. *Spears*, *supra*; *Nelms v. Martin*, 100 Ark. App. 24, 263 S.W.3d 567 (2007). By the terms of the statute, Sargent was thus not required to proffer expert testimony to establish Dr. Rogers's negligence in leaving the sponge in his body. However, this does not mean that Sargent is entitled to judgment as a matter of law. The "common knowledge" exception merely allows Sargent to present his case without the use of expert testimony; it does not conclusively establish his case. While the exception does not require Sargent to produce expert testimony in presenting his case, it likewise does not preclude him from using expert evidence in order to prove negligence on the part of Dr. Rogers.

The doctrine of res ipsa loquitur may apply in medical malpractice cases. *Schmidt v. Gibbs*, 305 Ark. 383, 807 S.W.2d 928 (1991). As the Arkansas Supreme Court has explained,

> The doctrine of *res ipsa loquitur* does not relieve the plaintiff of the burden of proving negligence; it merely declares the conditions under which a *prima facie* showing of negligence has been made, and, where this has been done, the defendant having the custody and control of the agency causing the injury and the opportunity to make the examination to discover the cause, must furnish the explanation which this opportunity affords to overcome the *prima facie* showing made by the plaintiff.

Johnson v. Greenfield, 210 Ark. 985, 991, 198 S.W.2d 403, 405-06 (1946) (quoting *Arkansas Light & Power Co. v. Jackson*, 166 Ark. 633, 640, 267 S.W. 359, 361 (1924)).

Neither the Medical Malpractice Act nor our case law provides that the mere presence of a foreign object in a surgical patient establishes liability on the part of the surgeon as a matter of law. Instead, "[w]hether the particular act was negligent is for the jury to decide, after considering the circumstances of the case." *Spears*, 168 Ark. at 363, 270 S.W. at 526. Although decided in 1925, *Spears* has never been overruled and remains the law in this jurisdiction. Despite the *Spears* holding that the surgeon cannot relieve himself from liability by delegating the responsibility for counting the sponges to the nurses assisting him, the court went on to hold that the surgeon was allowed to present evidence to the jury that explained "the circumstances of the case." Dr. Rogers did so in the form of Dr. Mahone's affidavit stating that the sponge was left in an area of Sargent's abdomen that was relatively inaccessible and unlikely to be visible to Dr. Rogers as he performed the surgery. Dr. Mahone also said that it was reasonable and within the standard of care for Dr. Rogers to rely on the nurses' sponge counts as being "correct." From this evidence, a jury could reasonably find that,

despite leaving a sponge in Sargent's abdomen, Dr. Rogers was not negligent in doing so, precluding a consideration of damages. However, the jury, when given "the circumstances of the case," *Spears*, 168 Ark. at 363, 270 S.W. at 526, may determine Dr. Rogers to have been negligent, making damages an appropriate consideration.

The evidence presented by Dr. Rogers created a jury question as to his liability, and summary judgment was inappropriate. We therefore reverse and remand for a new trial.

Reversed and remanded.

HENRY and BROWN, JJ., agree.