IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 14, 2009 Session

ALAN GENTRY v. MARTIN H. WAGNER, M.D.

Appeal from the Circuit Court for Davidson County
No. 07C-2178 Barbara N. Haynes, Judge

No. M2008-02369-COA-R3-CV - Filed June 30, 2009

Patient brought a negligence action against neurologist for injuries allegedly arising out of a court-ordered medical evaluation. We find no abuse of discretion in the trial court's denial of the plaintiff's motion to amend his complaint to include allegations of sexual battery. We also agree with the trial court's grant of summary judgment in favor of the neurologist based on the absence of expert testimony to support the plaintiff's claim. Therefore, we affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Alan Gentry, Franklin, Tennessee, Pro Se.

E. Reynolds Davies, Jr., John T. Reese, Ed. R. Davies, and Andrew Chad Davidson, Nashville, Tennessee, for the appellee, Martin H. Wagner, M.D.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Alan Gentry was in a car accident in September 2001 in which he allegedly injured his neck and lower back. As part of a tort action[1] brought by Mr. Gentry for injuries from the car accident, Mr. Gentry was ordered to submit to a physical examination by Dr. Martin W. Wagner, a neurologist. The present case arises out of injuries allegedly sustained by Mr. Gentry during his appointment with Dr. Wagner on June 29, 2007.

---

[1] *Gentry v. Pritchard*, No. 04C-2195 (Davidson County Circuit Court filed July 29, 2004).

Mr. Gentry filed suit against Dr. Wagner and Allstate Insurance Company, insurer of Thomas and Hope Pritchard, the defendants in Mr. Gentry's car accident lawsuit. According to Mr. Gentry's complaint, filed on August 1, 2007, Dr. Wagner injured Mr. Gentry during the course of his examination in the following ways:

> a. Over extending Plaintiff's already injured neck;
>
> b. Jerked and forced Plaintiff's head from side to side and forward and backwards in sharp, jerking motions beyond the range of motions Plaintiff was physically able to endure;
>
> c. Over extending Plaintiff's already injured lower back; and
>
> d. Jerked and forced Plaintiff's upper torso from side to side and forward and backwards in sharp, jerking motions beyond the range of motions Plaintiff was physically able to endure.

Mr. Gentry alleged causes of action for "negligence, malfeasance, intentional tort, and conspiratorial actions" against Dr. Wagner and sought compensatory damages. In an amended complaint filed on August 20, 2007, Mr. Gentry added a prayer for punitive damages. Dr. Wagner answered the complaint, denying the allegations of improper conduct during the examination and asserting that he "complied with the recognized standard of acceptable medical professional practice in his specialty."

In support of a "motion for clarification,"[2] Mr. Gentry filed an affidavit and then an amended affidavit in January 2008 further detailing his version of the June 29, 2007 examination by Dr. Wagner. According to Mr. Gentry's affidavits, Dr. Wagner threatened to report that Mr. Gentry was uncooperative and malingering when he asked to postpone the examination due to a headache. The affidavits also state that, upon learning that Mr. Gentry was a paralegal, Dr. Wagner berated and lectured him about the detrimental impact of the legal profession on his life. The affidavits then give a detailed account of the actual examination:

> After Dr. Wagner finish[ed] interrogating and berating me, he told me to stand up and face him. I complied. Dr. Wagner stood in front [of] me and informed me he was going to test the range of motion of my neck. I informed Dr. Wagner to be careful and do it slowly because I had a limited range of motion in movement of my neck. Dr. Wagner moved my neck to the right and I told him he was causing me pain and discomfort. Dr. Wagner said "you are resisting me" and he then forcibly pushed and jerked my neck to the right and then back to the left. Again I complained to Dr. Wagner that he was hurting me. I told him he was causing me pain. . . .

[2] The trial court rejected Mr. Gentry's motion for clarification, stating that the Tennessee Rules of Civil Procedure do not recognize such a motion.

> Dr. Wagner then shifted my upper torso of my body sharply to the right and to the left which caused me to have sharp pains in my lower back. Again, I complained and informed him that he was causing me great pain and discomfort. Dr. Wagner totally ignored my complaints. Dr. Wagner then told me to bend over and touch my toes. I informed him that I could touch my toes but I had to do it very slowly, like stretching. As I was going down slowly and almost to the floor, Dr. Wagner placed one hand on my back, just behind my head, and pushed me all the way down to the floor which caused me extreme pain in my lower back. Dr. Wagner's other hand was on my buttocks. Slowly and with restraint, I stood up and informed Dr. Wagner that his examination of me was over. I promptly walked out of his office at 4:15 p.m.

On May 28, 2008, the trial court granted Dr. Wagner's motion to transfer the case from the Sixth Circuit Court for Davidson County to the Third Circuit Court for Davidson County, where Mr. Gentry's car accident case was pending.

Mr. Gentry filed a motion to amend on June 3, 2008. In his proposed second amended complaint, Mr. Gentry again gave a detailed explanation of his appointment with Dr. Wagner on June 29, 2007. When describing the range of motion testing, particularly the maneuver of bending over and touching his toes, Mr. Gentry stated:

> As Plaintiff was going down slowly and was almost to the floor, Dr. Wagner placed one hand on his back, just behind his head, and pushed all the way down to the floor which caused him extreme pain in his lower back. Dr. Wagner's other hand was gripping and squeezing Plaintiff's buttocks. Slowly and with self restraint, Plaintiff stood up and informed Dr. Wagner that his alleged examination of his person was over.

The proposed second amended complaint includes causes of action for assault and battery, sexual battery, and conspiracy. In response to the defendants' opposition to his motion to amend the complaint, Mr. Gentry filed an affidavit on August 6, 2008, in which he gave an explanation as to why the allegations of sexual battery had not been included in his previous complaints or affidavits:

> Because of the dehumanizing acts perpetrated on me by Dr. Wagner, I have had to seek mental health counseling for anger management, depression and other matters to be revealed by my psychologist, Dr. Lawrence Gaines. Through therapy, Dr. Gaines made me realize that it was ok to reveal the shame, guilt and anger that I was experiencing and to include the sexual claim in my cause of action against Dr. Wagner.

On June 13, 2008, Dr. Wagner filed a motion for summary judgment supported by his own affidavit stating that, in examining Mr. Gentry, he "complied with the recognized standard of acceptable professional practice for the performance of such exams and specifically the performance

of my range of motion evaluation of Mr. Gentry's spine." Dr. Wagner further stated that he had not caused any injury or aggravation of injury to Mr. Gentry. Mr. Gentry responded with his own affidavit in which he asserted that he had no patient-physician relationship with Dr. Wagner and that Dr. Wagner's "dehumanizing inflictions upon me, could not be construed as complying with the recognized standard of acceptable medical practice for the performance of examinations of any type, by any medical professional. . . ."

Mr. Gentry's motion to amend was heard on August 8, 2008, and the court denied the motion. In its order of August 19, 2008, the court found that Mr. Gentry had known of the facts underlying his proposed second amended complaint since the beginning of the litigation. The court further stated:

> The Court finds repeated omissions by the Plaintiff to allege the facts now sought to be introduced by the "Second Amended Complaint" in sworn pleadings i.e. the Complaint sworn to on July 23, 2007 and filed on August 1, 2007, the Complaint sworn to and filed on August 20, 2007, the Plaintiff's Affidavit of January 4, 2008 and the Plaintiff's Affidavit of January 11, 2008 and also in testimony given by the Plaintiff on December 13, 2007 [in a deposition in the related car accident case].

The court found Mr. Gentry to be "guilty of undue delay" and concluded that "justice does not require the grant of leave to the Plaintiff to again amend his Complaint."

Dr. Wagner's motion for summary judgment was heard on August 29, 2008, and was granted by the trial court on the basis that Mr. Gentry had failed to produce expert testimony to prove the applicable standard of care. On October 23, 2008, the trial court entered an order granting Allstate's motion for summary judgment and dismissing with prejudice Mr. Gentry's cause against Allstate.

On appeal, Mr. Gentry argues that the trial court erred in denying his motion to amend the complaint and in granting Dr. Wagner's motion for summary judgment.

MOTION TO AMEND

Tenn. R. Civ. P. 15.01 provides that leave of court to amend pleadings "shall be freely given when justice so requires." The Tennessee Supreme Court has recognized that the language of Tenn. R. Civ. P. 15.01 "substantially lessens the exercise of pre-trial discretion on the part of a trial judge." *Branch v. Warren*, 527 S.W.2d 89, 91 (Tenn. 1975); *see also Hardcastle v. Harris*, 170 S.W.3d 67, 80-81 (Tenn. Ct. App. 2004). Rule 15.01 does not, however, provide that leave to amend "shall be given," only that it "shall be freely given." *See Waters v. Coker*, No. M2007-01867-COA-RM-CV, 2008 WL 4072104, *4 (Tenn. Ct. App. Aug. 28, 2008). Once a responsive pleading has been filed, a party is entitled to amend a pleading only with the adverse party's consent or with leave of court, which is within the trial court's discretion to grant or deny. Tenn. R. Civ. P. 15.01; *Waters*, 2008 WL 4072104, at *4. In ruling on a motion to amend a complaint, a trial court should consider several factors including: "1) undue delay in filing, 2) lack of notice to the opposing party, 3) bad

faith by the moving party, 4) repeated failure to cure deficiencies by previous amendments, 5) undue prejudice to the opposing party, and 6) futility of amendment." *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 42 (Tenn. Ct. App. 2006).

A trial court's decision on a motion to amend a pleading under Tenn. R . Civ. P. 15 is reviewed under an abuse of discretion standard. *Conley v. Life Care Ctrs. of Am., Inc.*, 236 S.W.3d 713, 723 (Tenn. Ct. App. 2007); *Fann v. City of Fairview, Tenn.*, 905 S.W.2d 167, 175 (Tenn. Ct. App. 1994). There has been an abuse of discretion "when the trial court reaches a decision against logic that causes a harm to the complaining party or when the trial court applies an incorrect legal standard." *Riley v. Whybrew*, 185 S.W.3d 393, 399 (Tenn. Ct. App. 2005). The trial court's decision will be upheld "so long as reasonable minds can disagree as to the propriety of the [trial court's] decision." *Id.* (quoting *State v. Scott*, 33 S.W.3d 746, 751 (Tenn. 2000)).

Mr. Gentry argues that the trial court erred in denying his motion to amend because the court did not explain its reasons for denying the motion. This argument must fail, however, because the trial court did set forth in its order reasons to support its denial of the motion: namely, undue delay and failure to include the additional facts in previous sworn statements. Mr. Gentry emphasizes the fact that these reasons were not explicitly stated when the court ruled from the bench. It is well-settled, however, that a court speaks through its orders and judgments. *Palmer v. Palmer*, 562 S.W.2d 833, 837 (Tenn. Ct. App. 1977).

Mr. Gentry further asserts that the trial court relied on inaccurate facts or conclusions in denying his motion to amend. In particular, Mr. Gentry references the following statement made by the trial court at the hearing: "I find that amazing that with all the discovery that has taken place I can find nothing in there indicating a need to amend the pleadings." Mr. Gentry points out that this case was less than a year old at the time he filed his motion to amend in June 2008 and that depositions had not yet been taken. The parties had, however, made requests for admission from one another. And, as pointed out in the trial court's order denying the motion to amend, Mr. Gentry had been deposed in the car accident case.[3] Mr. Gentry also cites a statement by the trial court that "this man [Mr. Gentry] has known these facts since the beginning, that he has amended the complaint, and now faced with a summary judgment you come in here and want to allege some new counts." As Mr. Gentry points out, his motion to amend was filed ten days before Dr. Wagner's motion for summary judgment was filed. The sequence of filings alone does not preclude the possibility that Mr. Gentry was aware that a motion for summary judgment was imminent, especially since he had not produced any expert to support his claims. We find no factual errors to call into question the trial court's exercise of discretion.

Another argument made by Mr. Gentry is that the trial court applied an incorrect legal standard in denying his motion to amend. He distinguishes *March v. Levine*, a case cited by the trial court in support of its finding of undue delay, on the basis that the litigation in *March* had been going

[3] Mr. Gentry asserts that he did not mention Dr. Wagner's sexual battery in the deposition because the attorneys in that case stipulated that the scope of the deposition would be limited. No such stipulation appears in the record.

on for some 31 months with extensive discovery already completed at the time when the motion to amend was made, whereas the present case was less than a year old at the time Mr. Gentry requested leave to amend his complaint. *See March v. Levine*, 115 S.W.3d 892, 909 (Tenn. Ct. App. 2003). The factual support for a finding of undue delay in *March* may well be stronger than in the present case, but the factual distinctions delineated by Mr. Gentry do not establish an abuse of discretion on the part of the trial court in this case. As pointed out in *March*, "[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Id.* (quoting *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986)).

Mr. Gentry also points out that, when he filed his motion to amend in June 2008, he was still within the one-year statute of limitations for such negligence actions. Under Tenn. R. Civ. P. 15.03, a claim asserted in amended pleadings that "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" relates back to the date of the original pleading. Thus, even more than a year after June 29, 2007, the date of his appointment with Dr. Wagner, additional claims arising out of the same transaction or occurrence would relate back to the date of the original complaint. The statute of limitations issue is separate from the issue of whether the trial court should allow amendment of the pleadings.

Although reasonable minds could differ with the trial court's ruling on the motion to amend, we find no basis to conclude that the trial court abused its discretion in denying the motion in this case.

SUMMARY JUDGMENT

The trial court granted Dr. Wagner's motion for summary judgment based upon Mr. Gentry's failure to offer expert testimony to establish the applicable standard of professional practice, a breach of that standard of care, and proximate cause as required by Tenn. Code Ann. § 29-26-115. On appeal, Mr. Gentry argues that the trial court erred in concluding that expert testimony was necessary. Mr. Gentry asserts that there was no physician-client relationship between him and Dr. Wagner and that his cause of action is for ordinary negligence, not medical malpractice, and does not require expert testimony. We respectfully disagree with Mr. Gentry's position.

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). In reviewing a summary judgment, this court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). The party seeking summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that the party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). We must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. *Id.*; *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). If there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd*, 847

S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20, 25 (Tenn. 1975). To shift the burden of production to a nonmoving party who bears the burden of proof at trial, a moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 (Tenn. 2008).

We begin by examining the allegations made by Mr. Gentry against Dr. Wagner in his first amended complaint. As quoted above, Mr. Gentry's complaint alleges that Dr. Wagner injured him during the examination by overextending his neck, moving and forcing his head from side to side and forward and backward "in sharp, jerking motions beyond the range of motions Plaintiff was physically able to endure," overextending his lower back, and moving and forcing his upper torso from side to side and forward and backward "in sharp, jerking motions beyond the range of motions Plaintiff was physically able to endure." Thus, this case does not involve allegations that Dr. Wagner failed to diagnose a dangerous condition or submitted an inaccurate report. *See Martinez v. Lewis*, 969 P.2d 213, 219 (Colo. 1998) (physician performing independent medical examination had no duty of care to examinee with respect to making report to insurance carrier); *Webb v. T.D.*, 951 P.2d 1008, 1013-14 (Mont. 1997) (physician performing independent medical examination at request of workers' compensation carrier owed examinee duty to exercise reasonable care to discover conditions posing an imminent danger to the examinee and to communicate that information to the examinee); *Keene v. Wiggins*, 138 Cal. Rptr. 3, 8 (Cal. Ct. App. 1977) (physician performing examination at request of workers' compensation carrier had no duty of care to examinee with respect to report to carrier). Rather, our case involves the examining physician's duty not to injure the examinee in the course of the examination, a duty that appears to be generally recognized. *See Yoder v. Cotton*, 758 N.W.2d 630, 637 (Neb. 2008); *Bazakos v. Lewis*, 56 A.D.3d 15, 20 (N.Y. App. Div. 2008); *Harris v. Kreutzer*, 624 S.E.2d 24, 32 (Va. 2006); *Dyer v. Trachtman*, 679 N.W.2d 311, 314 (Mich. 2004); *Ramirez v. Carreras*, 10 S.W.3d 757, 762 (Tex. 2000); *Mero v. Sadoff*, 37 Cal. Rptr. 2d 769, 776 (Cal. Ct. App. 1995); *Greenberg v. Perkins*, 845 P.2d 530, 538 (Colo. 1993); *see also* J. P. Ludington, Annotation, *Physician's Duties and Liabilities to Person Examined pursuant to Physician's Contract with such Person's Prospective or Actual Employer or Insurer*, 10 A.L.R.3d 1071, § 8 (1966).

While the courts generally agree that an examining physician has a duty not to injure the examinee during the examination, the analysis used by the courts to describe the nature of this duty varies. *See Harris*, 624 S.E.2d at 30. And this analysis affects the courts' conclusions as to whether expert testimony is required in such cases. In one group of cases, the courts decline to find any physician-patient relationship when the examinee is ordered by an insurance company, employer, or court to submit to the examination. For example, in the New York case of *Bazakos v. Lewis*, the court concluded that a medical examination statutorily required as part of a personal injury action did not give rise to a physician-patient relationship. *Bazakos*, 56 A.D.3d at 20. The court determined that "[t]he examining physician's duty not to affirmatively injure the examinee during the evaluation is adequately and appropriately embraced within a simple negligence cause of

action."[4] *Id.* In *Ramirez v. Carreras*, the Texas court stated that "the duty to treat the patient with professional skill flows from the consensual relationship between the patient and physician, and only when that relationship exists can there be a breach of a duty resulting in medical malpractice." *Ramirez*, 10 S.W.3d at 761 (quoting *St. John v. Pope*, 901 S.W.2d 420, 423 (Tex. 1995)). Finding no physician-patient relationship to arise from an examination mandated by an insurance carrier, the court found no medical malpractice cause of action. *Id.* at 762. The court concluded that the plaintiff was not required to produce expert testimony to create a fact issue regarding the duty not to injure. *Id.* at 763*; see also Canfield v. Grinnel Mut. Reins. Co.*, 610 N.W.2d 689, 692 (Minn. Ct. App. 2000) (no medical malpractice claim under statute because physician not providing care or treatment, therefore no expert testimony required).

In the other group of cases, the courts recognize a limited physician-patient relationship arising in the context of an independent medical examination. In *Yoder v. Cotton*, the Supreme Court of Nebraska considered a negligence claim filed against a physician who performed an independent medical examination in a workers' compensation action. *Yoder*, 758 N.W.2d at 633. The examinee, Yoder, alleged that the physician, Cotton, had manipulated his injured right shoulder in such a way as to cause further injury. *Id.* Yoder argued that this was not a medical malpractice claim and that a "general standard of care should apply." *Id.* at 637. The court rejected this argument, concluding that Cotton was "rendering professional services" and that the standards applicable to medical malpractice cases should apply. *Id.* After reviewing caselaw from other states as well as an opinion of the American Medical Association's Counsel on Judicial and Ethical Affairs,[5] the court concluded that "the relationship between a physician performing an IME and an examinee is that of a limited physician-patient relationship." *Id.* at 638. Because Yoder had failed to present expert testimony on proximate cause, the court affirmed the trial court's grant of summary judgment in favor of Cotton. *Id.* Similarly, in *Harris v. Kreutzer*, another case involving injuries allegedly sustained during an independent medical examination, the Supreme Court of Virginia found the patient impliedly consented and the physician expressly consented to establishment of a limited physician-patient relationship. *Harris*, 624 S.E.2d at 30; *see also Bazakos*, 56 A.D.3d at 28 (Covello, J., dissenting) (stating that an IME physician "impliedly promises that in performing the examination, he or she will exercise his or her medical skills just as carefully as if the examinee was his or her own patient" and finding a limited physician-patient relationship to be implied.). After finding that a physician conducting such an examination had a duty not to harm the patient, the court concluded that the action was for medical malpractice, not ordinary negligence, noting that such cases raise issues of medical judgment. *Harris*, 624 S.E.2d at 32 n.10; *see also Dyer*, 679 N.W.2d at 316-17 (recognizing limited physician-patient relationship giving rise to duty not to injure and classifying case as a medical malpractice action). In dicta, the court assumed that expert testimony would be required. *Harris*, 624 S.E.2d at 33.

---

[4] The court in *Bazakos* did not have to reach the issue of expert testimony, but stated that "whether an action sounds in medical malpractice does not depend on the need for expert testimony." *Bazakos*, 56 A.D.3d at 18.

[5] The report, entitled "Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations," stated that "a limited patient-physician relationship should be considered to exist during isolated assessments of an individual's health or disability for an employer, business, or insurer." *Yoder*, 758 N.W.2d at 638.

We find the latter approach to IME cases to be more consistent with Tennessee law. Our Supreme Court has applied the following standards when distinguishing between ordinary negligence and medical malpractice:

> [W]hen a claim alleges negligent conduct which constitutes or bears a substantial relationship to the rendition of medical treatment by a medical professional, the medical malpractice statute is applicable. Conversely, when the conduct alleged is not substantially related to the rendition of medical treatment by a medical professional, the medical malpractice statute does not apply.

Gunter v. Lab. Corp. of Am., 121 S.W.3d 636, 641 (Tenn. 2003). In *Gunter*, the Court determined that a case involving the adequacy of a laboratory's blood testing procedures did "not implicate issues of medical competence or judgment linked to [the plaintiff's] treatment." *Id.* In *Kelley v. Middle Tenn. Emergency Physicians, P.C.*, the Supreme Court reviewed the trial court's grant of summary judgment in favor of Dr. Cage, a cardiologist who provided consultation over the telephone to another physician with respect to the plaintiffs' decedent's treatment. *Kelley*, 133 S.W.3d 587, 591 (Tenn. 2004). Dr. Cage argued that there was no physician-patient relationship; the plaintiffs argued that there were disputed issues as to the existence of such a relationship.[6] *Id.* The Court reviewed numerous Tennessee cases stating that "a physician-patient relationship is an 'essential' or 'necessary' element of a medical malpractice action." *Id.* at 592. Pursuant to this caselaw, the Court reasoned that "a physician's duty of care arises from the physician-patient relationship." *Id.* at 593. The Court also made the following statements regarding the physician-patient relationship:

> In light of the increasing complexity of the health care system, in which patients routinely are diagnosed by pathologists or radiologists or other consulting physicians who might not ever see the patient face-to-face, it is simply unrealistic to apply a narrow definition of the physician-patient relationship in determining whether such a relationship exists for purposes of a medical malpractice case. Based upon the foregoing authorities, we hold that a physician-patient relationship may be implied when a physician affirmatively undertakes to diagnose and/or treat a person, or affirmatively participates in such diagnosis and/or treatment.

Id. at 596 (footnotes omitted).

While neither of these Supreme Court cases addresses the situation before us, where a physician performs an independent medical examination in the context of a personal injury case, we believe the Court's decision in *Kelley* indicates a willingness to imply a physician-patient relationship appropriate to a particular situation. Moreover, as the Court in *Kelley* observed, existing Tennessee caselaw has found the duty of care to arise from a physician-patient relationship. *Kelley*,

---

[6] The plaintiffs also argued that a physician-patient relationship was not an indispensable element of a medical malpractice action and that Dr. Cage owed the plaintiffs' decedent a duty of care even without such a relationship. *Kelley*, 133 S.W.3d at 591. The court did not reach this issue. *Id.* at 598.

133 S.W.3d at 593. Thus, in order to find a duty not to injure the examinee, it makes sense that we imply a limited physician-patient relationship. Based upon the *Gunter* analysis, it could be argued that this is not a medical malpractice case because Dr. Wagner did not *treat* Mr. Gentry. As the trial court noted, however, Dr. Wagner "did affirmatively undertake to diagnose the medical condition of" Mr. Gentry, as contemplated by the Court in *Kelley*.

We agree with the conclusion of the trial court: "An implied patient-physician relationship[7] did exist between the Plaintiff Gentry and the Defendant Wagner. This is a medical malpractice action governed by T.C.A. 29-26-115 et seq." The medical malpractice statutes require expert testimony to establish the applicable standard of care. Tenn. Code Ann. § 29-26-115.[8]

In the summary judgment context, our Supreme Court has held: "[I]n those malpractice actions wherein expert testimony is required to establish negligence and proximate cause, affidavits by medical doctors which clearly and completely refute plaintiff's contention afford a proper basis for dismissal of the action on summary judgment, in the absence of proper responsive proof by affidavit or otherwise." *Bowman v. Henard*, 547 S.W.2d 527, 531 (Tenn. 1977). A defendant may shift the burden by submitting his or her "own self-serving affidavit stating that their conduct neither violated the applicable standard of care nor caused injury to their patient that would not otherwise have occurred." *Kenyon v. Handal*, 122 S.W.3d 743, 758 (Tenn. Ct. App. 2003). Dr. Wagner's affidavit shifted the burden of production to Mr. Gentry. To avoid summary judgment, Mr. Gentry was required to produce expert testimony to create a genuine issue of material fact. Because Mr. Gentry failed to offer any expert testimony, the trial court property granted the defendant's motion for summary judgment.

CONCLUSION

We affirm the decision of the trial court. Costs of appeal are assessed against the appellant, for which execution may issue if necessary.

_____

ANDY D. BENNETT, JUDGE

[7] For purposes of this case, we need find only a limited patient-physician relationship giving rise to a duty not to injure.

[8] It has been stated that "the need for expert testimony does not always signify medical malpractice." *Estate of Doe v. Vanderbilt Univ., Inc.*, 958 S.W.2d 117, 123 (Tenn. Ct. App. 1997). Even if we classify this case as one of simple negligence, we believe that an evaluation of the propriety of Dr. Wagner's actions would require expert testimony. The allegations against Dr. Wagner call into question his professional judgment and skill in conducting range of motion testing on Mr. Gentry. Professionals are to be judged according to the standard of care required by their profession. *Dooley v. Everett*, 805 S.W.2d 380, 384 (Tenn. Ct. App. 1990).