UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

TAMARA RENA TABOR,	)	
	)	
Plaintiff,	)	Case No. 1:01CV00035
	)	
v.	)	**OPINION**
	)	
FRANKLIN J. SUTHERLAND, D.O.,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

Carl E. McAfee, McAfee Law Firm, P.C., Norton, Virginia, for Plaintiff; William M. Moffet, Penn, Stuart & Eskridge, Abingdon, Virginia, for Defendant.

In this medical malpractice case, the defendant physician moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.[1] The court heard argument on April 2, 2002, at the conclusion of which I found that the plaintiff had not presented a genuine issue of material fact as to any harm caused by the physician's alleged breach of the standard of care. I therefore granted the defendant's motion for

[1] After the filing of this case, the defendant filed a petition for Chapter 7 relief in the United States Bankruptcy Court for the Western District of Virginia. That court has entered an order lifting the automatic stay imposed by 11 U.S.C.A. § 362 (West 1993 & Supp. 2001), thus allowing this civil action to proceed to judgment. *See* Stipulation Granting Relief from Automatic Stay, *In re Sutherland, Franklin J.*, Ch. 7 Case No. 01-03593-WSB (Bankr. W.D. Va. Apr. 1, 2002).

summary judgment. My reasons for that decision are explained more fully in this written opinion.

I

The plaintiff, Tamara Rena Tabor, sought weight loss treatment from the physicians at The Sutherland Clinic beginning in March 1995 and continuing through September 2000. Those physicians included the defendant, Franklin J. Sutherland ("Dr. Sutherland"), and his father, J.P. Sutherland, Sr. ("Dr. Sutherland, Sr."). She was initially examined by Dr. Sutherland, Sr., who treated Tabor for approximately two years. At each visit, Dr. Sutherland, Sr. prescribed phentermine, an appetite suppressant designed to aid in weight reduction.

The defendant first saw Tabor on March 3, 1997. He continued to prescribe phentermine for Tabor between that visit and her final appointment with him on August 16, 2000. Tabor visited The Sutherland Clinic again on September 22, 2000, and was prescribed phentermine by another physician, Harold Shultz, D.O.[2]

[2] Dr. Shultz was initially a co-defendant in this case, but was voluntarily dismissed by the plaintiff.

During these years, Tabor also received weight loss treatment, which included prescriptions for phentermine and fen-phen,[3] from other doctors not associated with The Sutherland Clinic.

Tabor claims that she suffers from severe cardiac and pulmonary problems as a result of taking phentermine. Her only designated expert, Nikki Lang, M.D., a family practitioner, opines that Dr. Sutherland deviated from the standard of care in three significant ways: (1) by prescribing phentermine for long-term use; (2) by prescribing phentermine when Tabor's body mass index was below thirty; and (3) for not advising Tabor regarding the benefits of diet and exercise. Dr. Lang specifically states, however, that the plaintiff should seek the opinion of a specialist on the issue of whether she has suffered any harm due to her intake of phentermine. Tabor's failure to supply an expert opinion on the issue of causation prompted the defendant's motion for summary judgment.

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[3] Fen-phen refers to the use in combination of fenfluramine and phentermine. On July 8, 1997, the Mayo Clinic reported that 24 patients developed heart valve disease after taking fen-phen. In September 1997 the FDA asked the manufacturers of fenfluramine and dexfenfluramine to voluntarily withdraw those two products from the market. The FDA's action was based on new findings from doctors who had used echocardiograms to evaluate patients taking these two drugs. The findings indicated that approximately 30 percent of patients taking the two drugs had abnormal echocardiograms. The FDA did not, however, request the withdrawal of phentermine. *See* U.S. Food & Drug Admin., *FDA Announces Withdrawal of Fenfluramine and Dexfenfluramine (Fen-Phen)*, http://www.fda.gov/cder/news/phen/fenphenpr81597.htm.

II

Summary judgment is appropriate when there is "no genuine issue of material fact," given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the nonmoving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Id.* at 327.

To establish a prima facie case of medical malpractice, the plaintiff must establish: (1) the applicable standard of care, (2) that the standard has been violated, and (3) that there is a causal relationship between the violation and the alleged harm. *See Fitzgerald v. Manning*, 679 F.2d 341, 346 (4th Cir. 1982). In a diversity case, these substantive elements of the negligence claim are questions of state law. *See id.*

Under Virginia law,[4] the plaintiff must produce expert testimony on the causation issue, unless the doctor's act or omission is clearly negligent within the common knowledge of laymen. *See Ellis v. Kilgore*, No. 93-1811, 1994 WL 320233, at *3-4 (4th Cir. July 6, 1994) (unpublished) (citing *Raines v. Lutz*, 341 S.E.2d 194, 195 n.2 (Va. 1986)); *Fitzgerald*, 679 F.2d at 350 (applying Virginia law). Furthermore, the expert medical opinion must be expressed in terms of a "'reasonable degree of medical certainty'" and must demonstrate "that it was more likely that the defendant's negligence was the cause than any other cause" in order for the issue of causation to be submitted to the jury. *Fitzgerald*, 679 F.2d at 350 (quoting *Crawford v. Quaterman*, 172 S.E.2d 739, 744 (Va. 1970)).

Assuming only for the purposes of this opinion that Dr. Sutherland breached the standard of care by prescribing phentermine to Tabor, there is no evidence in the record to establish that Tabor's alleged physical condition is a result of taking the phentermine prescribed by Dr. Sutherland. According to her cardiologist, L. Collier Jordan, Jr., M.D., Tabor does not suffer from pulmonary hypertension, heart disease, or structural

[4] A federal court exercising diversity jurisdiction must apply the law of the state in which it sits, *see Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938), including that state's choice of law rules, *see Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941). In tort actions like this one, Virginia applies the substantive law of the place of the wrong. *See Jones v. R.S. Jones & Assoc.*, 431 S.E.2d 33, 34 (Va. 1993). Accordingly, Virginia law applies in this case.

damage to her heart.[5] He performed numerous tests on the plaintiff, including echocardiograms, an EKG, chest X ray, stress tests, and a cardiac catheterization. These procedures revealed that Tabor suffers only from tachycardia (a rapid heart rate), the etiology of which is undetermined. Dr. Jordan does not believe that Tabor's condition is due to phentermine exposure.[6]

The defendant's expert, Phillip Goldstein, M.D., likewise opines, to a reasonable degree of medical certainty, that Tabor's rapid heart rate is not caused by the phentermine prescribed by Dr. Sutherland. Based upon his review of the medical evidence and deposition transcripts, he agrees that Tabor does not suffer from any structural damage to her heart or pulmonary hypertension. He has found nothing in the medical literature to indicate that phentermine, not used in combination with fenfluramine, can cause any of the conditions allegedly suffered by Tabor. Finally, he states that even if Tabor were damaged by taking diet medication, there would be no way to determine whether that damage had been caused by the phentermine prescribed

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[5] Dr. Jordan testified that he is aware of two conditions—pulmonary hypertension and valvular heart disease—that have been attributed to certain diet drugs. There is no evidence that Tabor suffers from either condition. (Jordan Dep. at 37.)

[6] Although Dr. Jordan could not pinpoint the cause of Tabor's tachycardia, his reports indicate three possible causes for the condition: primary sinus tachycardia, autonomic dysfunction, and sinoatrial automatic tachycardia. None of these causes is related to the ingestion of phentermine. (Jordan Dep. at 33-38.)

by Dr. Sutherland or the diet pills she obtained from other physicians. (Goldstein Aff. at 1-2.)

Tabor relies on a progress note prepared by Christopher W. Scholes, M.D., a cardiologist, on March 22, 2002, following an evaluation of the plaintiff. Dr. Scholes has not been designated as an expert in this case, and his report is an unsworn document. Most importantly, he never expresses an opinion as to the cause of Tabor's tachycardia. He assesses her with essential tachycardia and atypical chest pains, but never links her symptoms to her history of diet pill exposure. His report therefore does not support the plaintiff's claim of harm as a result of the defendant's negligence.

III

Tabor's failure to produce an expert on the issue of causation is fatal to her case because the specialized matters at issue are not within the common knowledge or experience of a jury. Based upon the summary judgment record provided by the parties and their experts, and viewing the facts in the light most favorable to the plaintiff, there is insufficient evidence to show that Dr. Sutherland's allegedly negligent conduct contributed in any way to Tabor's claimed damages. Tabor fails to establish a prima facie case because she cannot establish causation, a required element in this medical

malpractice action. Thus, summary judgment in favor of the defendant must be granted.

A separate final judgment consistent with this opinion is being entered herewith.

DATED: April 10, 2002

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United States District Judge