

Friday 18th July, 2008.

Jo Lynn Kraina, Appellant,
against Record No. 071718
Circuit Court No. CL06-640
Claire M. Carman, M.D., et al., Appellees.

Upon an appeal from a
judgment rendered by the Circuit
Court of the City of Norfolk.

Upon consideration of the record, briefs, and argument of counsel, the court is of opinion that there is reversible error in the judgment of the Circuit Court of the City of Norfolk.

Jo Lynn Kraina (the plaintiff) brought a civil action in the circuit court against Claire M. Carman, M.D., Breast Care Specialists, P.C., Robert H. Schnarrs, M.D., The Hague Center for Cosmetic & Plastic Surgery, Inc., and Plastic Surgery Center, Inc., d/b/a The Mladic Center for Cosmetic Plastic Surgery, (the defendants) for damages resulting from medical malpractice. Her complaint alleged that the defendants had operated on her on November 26, 2001 "to perform bilateral excision of ruptured [breast] implants with bilateral breast reduction." She alleged that she was in the defendants' continuous care from November 26, 2001 through March 29, 2002, but that the defendants had "failed to diagnose and treat bilateral postoperative breast infections in a timely fashion."

Her specific allegations of negligence were:

9. The defendants refused to prescribe systemic antibiotic therapy in the presence of bilateral, purulent drainage and left nipple and areolar necrosis until Kraina insisted upon same.

10. The defendants negligently prescribed a mere ten (10) days of oral Cipro beginning 12/28/01 and ending 01/02/02, failing to continue systemic antibiotic therapy when Kraina had become febrile and continued to have significant bilateral purulent drainage.

11. The defendants negligently continued to treat Kraina's bilateral breast abscesses with incision and drainage procedures and topical applications.

12. The defendants negligently contradicted the diagnosis and treatment regimen, I.V. antibiotics to treat actinomyces meyeri, the organism identified by Dr. Scott Miller, an infectious disease specialist, on February 13, 2002.

The complaint also contained the following general allegation:

13. On or between the dates of November 26, 2001, and March 29, 2002, the defendants failed to exercise the degree of skill and diligence that reasonably prudent practitioners in the same field of practice or specialty would have exercised under the circumstances of this case and were, therefore, negligent in failing to accurately and timely treat Kraina.

The present case is a refile of a previous case that the plaintiff nonsuited. In answers to interrogatories in the previous case, the plaintiff identified Michael F. Chiaramonte, M.D. as an expert witness to be called at trial. In answers to interrogatories in the present case, the plaintiff contended that certain defendants "were negligent in performing the capsulectomy, removal of implant and reduction at the same time."

Pursuant to a scheduling order in the present case, the plaintiff filed an expert witness designation, naming Dr. Chiaramonte as her sole expert witness as to causation and the appropriate standard of care. The designation stated that the witness "may testify" that the defendants were negligent in failing to perform a two-stage procedure, "with a three to six month delay between implant removal and mammoplasty," thus giving the operated

area "time to heal and achieve vascularity," which would have avoided postoperative infection and loss of tissue. The designation also disclosed Dr. Chiaramonte's further opinion that the defendants had negligently employed an "interior pedical" to perform the surgery and that a "superior medial pedical" would have provided improved blood supply, avoiding disfigurement. The designation made no reference to any negligence on the part of the defendants in treating the plaintiff's postoperative infection.

The defendants filed motions to strike the plaintiff's expert witness designation, contending that the complaint framed a cause of action limited solely to the defendants' alleged negligence in treating the postoperative infection the plaintiff developed after surgery, but that the plaintiff, shortly before trial, had abandoned that theory and now intended to present an entirely new theory based on negligence in planning and executing the surgery itself. The circuit court granted the motions to strike. The defendants then moved for summary judgment on the ground that the plaintiff had no expert testimony on causation and the standard of care, citing Raines v. Lutz, 231 Va. 110, 115, 341 S.E.2d 194, 197 (1986). The court granted the motions and entered summary judgment for the defendants. We awarded the plaintiff an appeal.

Rule 1:4(d) provides: "Every pleading shall state the facts upon which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense." Rule 3:18(b) provides: "An allegation of negligence or contributory negligence is sufficient without specifying the particulars of the negligence." Paragraph 13 of the plaintiff's complaint, quoted above, made a general allegation of negligence on the defendants' part occurring "[o]n or between the dates of November 26, 2001 and March 29, 2002." November 26, 2001 was the date on which, according to the complaint, the defendants had performed surgery on the plaintiff. Thus, the complaint was sufficient to put the defendants on notice that they were charged with negligence occurring on the day of the surgery itself, in addition to negligence during the postoperative period.

Because the plaintiff's expert witness designation was silent concerning the defendants' treatment of the plaintiff during the postoperative period, the defendants would be entitled, upon proper motion, to exclude any testimony from Dr. Chiaramonte related to their treatment of the plaintiff after the surgery. For the reasons stated, however, the circuit court erred in excluding his testimony in its entirety. Because the plaintiff did not lack an expert witness on causation and the standard of care relating to the surgery of November 26, 2001, the court erred in granting summary judgment for the defendants.

For the reasons stated, the Court reverses the judgment of the circuit court and remands the case for trial.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Clerk