CASE NO. 15-CI-003710

JEFFERSON CIRCUIT COURT
DIVISION TWO (2)
JUDGE ANNIE O'CONNELL

MARSHA D. WALKER **PLAINTIFF**

V.

OPINION AND ORDER DENYING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STEVEN F. SAMUEL, M.D.
and SAMUEL, STEWART & ASSOCIATES, P.S.C. **DEFENDANTS**

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This action comes before the Court on a Motion for Summary Judgement brought by the Defendants, Steven F. Samuel, M.D. and Samuel, Stewart & Associates, P.S.C. Plaintiff, Marsha D. Walker, has brought this action asserting a claim for negligence against Dr. Samuel for negligence. Defendants now ask the Court to dismiss the claim for negligence and to dismiss Walker's claim for medical expenses incurred by her care and treatment with Darel Barnett, M.D. and Dr. Richard Pokorny, M.D. For the following reasons, the Court denies the Motion for Summary Judgment.

OPINION

Walker was treated by Dr. Samuel first in 2008 for a repair of a recurrent ventral hernia with mesh and an open repair with plug and patch Marlex of a right inguinal hernia. On March 3, 2009, March 16, 2010, June 20, 2014, and June 20, 2014 Dr. Samuel performed additional repairs/surgeries. On August 9, 2014, Walker had an open recurrent incisional hernia with mesh and bilateral component separation by Dr. Richard Pokorny to repair an unhealed and recurrent incisional hernia with exposed mesh. Walker then brought this action asserting negligence against Dr. Samuel and his practice. The Defendants now ask for Summary Judgment.

In Kentucky, a movant should not succeed on a motion for summary judgment unless it appears impossible for the non-moving party to produce evidence warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W. 2d 476 (Ky. 1991). The term "impossible" is used in a practical sense and not in an absolute sense. *Perkins v. Hausladen*, 828 S.W. 2d 652 (Ky. 1992). Put simply, *Steelvest* merely states that the trial court should refrain from weighing evidence at the summary judgment stage. Instead, the inquiry should be whether, from the evidence of record, facts exist which would make it impossible for the non-moving party to prevail. *Welch v. American Publishing Co. of Kentucky*, 3 S.W. 3d 724, 730 (Ky. 1999). "The Movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Hallahan v. The Courier Journal*, 138 S.W. 3d 699, 705 (Ky. App. 2004) (quoting *Steelvest*, *Id.* at 482.)

The Kentucky Supreme Court has further opined that "[t]he circuit judge must examine the evidentiary matter, not to decide any issue of fact, but to discover if a real or genuine issue exists. All doubts are to be resolved in favor of the party opposing the motion." *City of Florence, Kentucky v. Chipman*, 38 S.W. 3d 387, 390 (Ky. 2001). With this standard in mind, the Court will examine the arguments of the parties.

First, the Defendants argue that no expert testimony exists that Dr. Walker's alleged negligence caused her to be treated by her pain management physician, Dr. Darel Barnett. Walker first went to Dr. Barnett on February 27, 2015 after a referral from Dr. Pokorny.[1] She has

[1] Plaintiff's Response at pp. 7-8.

continued to see him for various medications for nerve pain, muscle relaxant medication and physical therapy.[2]

In Kentucky, in a medical malpractice action, it is the plaintiff's burden to prove by expert testimony that the defendant's alleged negligence caused the plaintiff to undergo subsequent medical treatment. *Ashland Hospital Corp. v. Lewis*, 581 S.W.3d 572 (Ky. 2019). Dr. Barnett's video deposition testimony, alongwith the testimony of Dr. David Faber and Dr. Pokorny, is sufficient to create a material issue of fact as to whether his subsequent treatment for Walker's pain was due to negligence on the part of Dr. Samuel.

Defendants also argue in their motion that there is no testimony that Dr. Barnett's and Dr. Pokorny's charges for Walker's care were reasonable. Specifically, the physicians were asked whether the charges were reasonable and they deferred their answers. In Townsend v. Stamper, 398 S.W. 2d 45, 48 (Ky. App. 1965), the Kentucky Court of Appeals held that:

> The appellants urge that the trial court erred in permitting the jury to award medical expenses; the basis of this contention is that there was a failure to show that the medical expenses were reasonably necessary to the treatment of any injury sustained by appellee in the accident. … In the case at bar, the appellant presented vouchers reflecting payment of various medical expenses. She testified that all were incurred incident to treatment of the injuries she sustained in the accident. An itemized list of the medical expenses was introduced also. This was a prima facie showing of the reasonableness of the bills within the rationale of the cited cases. Appellants made no affirmative challenge of the reasonableness of the medical expenses, although they sought to show that appellee's complaints arose from conditions entirely independent of the accident. Under the evidence adduced, the jury had a reasonable basis to conclude that the incurred expenses were for treatment of injuries received by appellee in the accident.

Therefore, there is at least a prima facie showing by Walker of the reasonableness of the bills at this juncture. As a result, the Court will deny the Defendant's Motion for Summary Judgment.

[2] Dr. Barnett video deposition at pp. 17-20.

ORDER

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that the Motion for Summary Judgment brought by the Defendants be and hereby is **DENIED**.

/s/ HON. ANNIE O'CONNELL
electronically signed
8/18/2021 2:41:20 PM ET

ANNIE O'CONNELL, JUDGE
Jefferson Circuit Court

Entered 15-CI-003710 08/18/2021 David L. Nicholson, Jefferson Circuit Clerk