Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-034

JUNE TERM, 2002

Mary Jane Gray	}	APPEALED FROM:
v.	}	Orange Superior Court
State of Vermont, et al.	}	DOCKET NO. 138-7-99 Oecv
	}	Trial Judge: Amy M. Davenport

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the superior court's order granting summary judgment to defendants with respect to her personal injury claims. We reverse the court's ruling with respect to plaintiff's claim for pain and suffering, but affirm its judgment in all other respects.

On August 11, 1996, plaintiff was struck in the back, neck, and shoulder five or six times by a patient while she was visiting someone at the Vermont State Hospital. Plaintiff did not seek medical treatment for any injuries allegedly incurred during the incident until sixteen months later, in November 1997. A CAT scan did not reveal any abnormalities, and plaintiff's primary care physician refused to recommend an MRI or refer plaintiff to a chiropractor. Eventually, she saw a chiropractor on her own, and the chiropractor wrote letters to her attorney dated May 19, 1998 and January 18, 1999 concerning her injuries. In July 1999, plaintiff sued the State of Vermont, certain state agencies, and various individuals, alleging that she had incurred physical injuries and economic damages as the result of defendants' negligence in failing to control a dangerous patient. Defendants moved for summary judgment, arguing that plaintiff had failed to produce any expert evidence regarding causation. Plaintiff responded that expert testimony was not necessary, but later submitted into evidence the two letters from her chiropractor.

On December 12, 2001, the superior court granted defendants' motion for summary judgment. Noting that the parties had briefed only the issues of causation and damages, the court assumed, for purposes of defendants' motion, that plaintiff could prove that defendants had breached a duty to control the patient that struck plaintiff. The court concluded, however, that the issue of whether there was a causal connection between the alleged breach and the injuries alleged by plaintiff - misalignment of her neck vertebrae, hip, and ribs; scar tissue in her ankle; numbness in her arms and legs; sleeplessness; and weight gain - was outside the common experience of a reasonable jury to the degree that competent medical expert testimony was necessary. After noting that plaintiff's deposition testimony concerning causation was speculative, the court concluded that the two letters written by plaintiff's chiropractor were insufficient to preclude summary judgment because they failed to reflect any anticipated testimony on the issue of causation. In the court's view, the letters indicated merely that plaintiff had attributed her physical problems to the 1996 incident. Because plaintiff failed to proffer sufficient evidence on causation, the court granted summary judgment to defendants.

On appeal, plaintiff argues that the superior court erred in granting summary judgment to defendants because (1) there were issues of material fact in dispute regarding causation; (2) expert testimony was not necessary for the jury to resolve those issues; and (3) her claim for pain and suffering was based on an undisputed incident. Plaintiff first contends that her deposition testimony and a statement by her chiropractor in one of his letters should have precluded summary

judgment on the issue of causation. For the most part, we disagree. In her memorandum in opposition to defendants' motion for summary judgment, plaintiff stated that she suffered numerous injuries as the result of the attack at the hospital. Standing alone, this bare assertion was insufficient to avoid summary judgment on the issue of causation with respect to her alleged injuries. See White v. Quechee Lakes Landowners' Ass'n, 170 Vt. 25, 28 (1999) (party opposing summary judgment may not rest upon mere allegations, but must set forth specific facts showing that there is genuine issue for trial). Apart from her own bare assertion as to causation, plaintiff relies on the first sentence in her chiropractor's May 19, 1998 letter: "The above named patient presented herself at our office on 4/20/98 with the following complaints, which are the result of being assaulted on 8/12/96: 1. Neck pain, 2. Mid back pain, 3. Headaches." Plainly, this statement refers only to what plaintiff told the chiropractor was the cause of her physical ailments. As the superior court found, nowhere in either letter does the chiropractor opine that the August 11, 1996, incident was the cause of the conditions he found. In any event, neither letter satisfies V.R.C.P. 56(e), which requires that evidence supporting or opposing a motion for summary judgment be sworn, and that the affidavits be based on the affiant's personal knowledge. See Levy v. Town of St. Albans Zoning Board of Adjustment, 152 Vt. 139, 144-46 (1989).

Nevertheless, plaintiff contends that, given the undisputed fact that the August 11, 1996 incident occurred, a jury could have concluded that plaintiff's alleged injuries were caused by the incident, and thus the court erred by precluding the jury from considering the matter. Again, we disagree. Plaintiff presented no evidence that any of the injuries that may have occurred on August 11, 1996, had anything to do with the physical conditions diagnosed by plaintiff's chiropractor nearly two years later. Indeed, the superior court stated that the conditions found by the chiropractor in 1998 appeared to be dramatically different from the claimed injuries. Given the circumstances of this case, the court did not err in ruling that (1) expert testimony was required for the jury to make a reliable causative connection between plaintiff's alleged injuries and an incident that occurred long before plaintiff sought medical treatment, cf. Burton v. Holden & Martin, 112 Vt. 17, 19 (1941) (expert medical testimony required to demonstrate causative connection between infection from splinter and death from cerebral thrombosis two months later), and (2) that neither her deposition testimony nor the chiropractor's letters were sufficient to avoid summary judgment with respect to causation concerning those injuries.

Finally, plaintiff argues that because the August 11, 1996 incident indisputably occurred, the court should have at least allowed the jury to consider her claim for pain and suffering. We agree. The State has not disputed that a hospital patient struck plaintiff several times on August 11, 1996, and that the attack caused her pain and suffering. Assuming, as the trial court did for purposes of the State's summary judgment motion, that plaintiff can prove the State's failure to control a dangerous patient, a jury could conclude, even without the benefit of expert testimony, that the attack caused her pain and suffering. Cf. Burandt v. Clarke, 547 P.2d 89, 90 (Or. 1976) (reversing directed verdict for defendant because plaintiff's testimony that she suffered pain and shock when defendant's vehicle rear-ended hers was sufficient for jury to find causal connection between accident and claimed injuries). We reject the State's suggestion that plaintiff waived this argument by failing to raise it below.

Reversed and remanded for further proceedings consistent with this entry order.

BY THE COURT:

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice

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Marilyn S. Skoglund, Associate Justice