



removed the case to this court, based on diversity of citizenship and amount in controversy.

By order of March 20, 2002, I allowed the plaintiff's initial attorney to withdraw and stayed the action to allow the plaintiff to obtain another lawyer. On June 11, 2002, present counsel entered his appearance for the plaintiff. On June 20, 2002, the defendant moved for summary judgment in his favor, with a supporting declaration. By order of June 24, 2002, I directed the plaintiff to file a response to the motion for summary judgment within fourteen days. On July 10, 2002, the plaintiff filed a response to the motion for summary judgment, in which it was stated simply that the plaintiff "needs to take depositions and/or other discovery before properly responding to the motion for summary judgment."

In a detailed five and one-half page declaration filed in support of his motion for summary judgment, the defendant, a board certified anesthesiologist, explained the procedures he had performed during the plaintiff's labor and delivery, based on his recollection and the medical records. He concluded that he had not improperly administered any pain medication to the plaintiff, and that any symptoms now

complained of by the plaintiff could not have been caused by any such administration. The defendant accordingly requests summary judgment in his favor.<sup>1</sup>

## 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). Summary judgment is not “a disfavored procedural shortcut,” but an important mechanism for weeding out “claims and defenses [that] have no factual basis.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

In a diversity case, the substantive elements of a negligence claim are questions of state law. *See Fitzgerald v. Manning*, 679 F.2d 341, 346 (4th Cir. 1982). Under Virginia law,<sup>2</sup> to establish a prima facie case of medical malpractice, the plaintiff must

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<sup>1</sup> I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

<sup>2</sup> 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). In tort actions like this one, Virginia

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 id.* The plaintiff must produce expert testimony, unless the doctor's act or omission is clearly negligent within the common knowledge of laymen. *See id.* at 350.

The plaintiff has failed to present any evidence in support of her burden of proof in this case. The only remaining question is whether I should grant the plaintiff's request that she be given additional time to respond to the motion for summary judgment.

Rule 56(f) provides as follows:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

Fed. R. Civ. P. 56(f). The party opposing summary judgment bears the burden of showing what specific facts she hopes to discover that will raise an issue of material fact. *See Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995). "Vague assertions" that more discovery is needed are insufficient. *See id.* Moreover, as here, the failure

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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.

to file an affidavit setting forth the specific discovery that is needed is fatal to a request under Rule 56(f). *See id.*

This case has been pending for nearly eight months and was filed two years following the acts of alleged negligence. While it is true that the plaintiff was without an attorney during part of the time that the case has been pending and that her present attorney has only recently been employed, no medical malpractice action such as this is viable without expert opinion that professional negligence occurred, or at the least some clear idea of where such evidence might exist. In the present case, there is no indication that the plaintiff has any real basis for claiming that the defendant physician acted negligently or that his services injured her in any way. For these reasons, the plaintiff's request for additional discovery is denied and summary judgment will be granted in favor of the defendant. A separate judgment consistent with this opinion is being entered herewith.

DATED: August 5, 2002

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United States District Judge