RENDERED: July 13, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1999-CA-002049-MR

DONALD RUCKER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 98-CI-006547

JEWISH HOSPITAL HEALTH CARE SERVICE, INC., D/B/A JEWISH HOSPITAL — APPELLEE

AND; NO. 1999-CA-002081-MR

DONALD RUCKER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 98-CI-006547

WILLIAM C. RAMSEY AND JEANNIE EVANS — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, EMBERTON AND TACKETT, JUDGES.

TACKETT, JUDGE: This is a consolidated appeal wherein Donald Rucker appeals from an order of the Jefferson Circuit Court entered on July 16, 1999, granting summary judgment to William C. Ramsey, M.D. and Jeannie Evans, CRNFA, (Appeal No. 1999-CA-002081-MR), and an order entered on August 10, 1999, granting summary judgment to Jewish Hospital HealthCare Services, Inc. (Jewish Hospital) (Appeal No. 1999-CA-002049-MR) in a medical malpractice case. The trial court granted summary judgment because Rucker, despite being directed by the trial court to do so within a reasonable time, failed to disclose the expert medical witness he intended to use to support his medical malpractice claim, and because without an expert medical witness it would be impossible for Rucker to show that the appellees breached any duty owed to him in the course of providing him with medical treatment. We affirm.

On September 25, 1997, Dr. Ramsey performed reconstruction surgery on Rucker's right shoulder. It appears that Rucker's shoulder had originally been injured in 1995 in a horse riding accident. Dr. Ramsey was assisted in the operation by Nurse Evans, and the operation was performed at Jewish Hospital. In conjunction with the reconstruction surgery, Dr. Ramsey implanted "Steinman pins" and a "Bosworth screw" in Rucker's shoulder.

In a follow-up visit with Dr. Ramsey on November 21, 1997, it was determined that the Bosworth screw placed in Rucker's shoulder during the first surgery had 'pulled out' and that another reconstruction would be necessary. Rucker was

admitted into Jewish Hospital on April 22, 1998, for a second shoulder reconstruction surgery. On May 4, 1998, in a follow-up examination to the second surgery, Rucker was informed that another surgical adjustment of the fixation would have to be performed. On May 7, 1998, Rucker was admitted to Jewish Hospital for the readjustment surgery. At the subsequent June 19, 1998, follow-up examination, Dr. Ramsey informed Rucker that the Steinman pins were backing out, that the Bosworth screw may require tightening, and that further surgery for adjustment of plaintiff's fixation would be necessary; accordingly, on June 25, 1998, Rucker was again admitted into Jewish hospital for shoulder surgery.

On November 19, 1998, Rucker, who at all times relevant to this litigation was an inmate at the Kentucky State Reformatory, filed a pro se lawsuit against Dr. William C. Ramsey, Nurse Jeannie Evans, Jewish Hospital, and various "unnamed" defendants, alleging medical malpractice. The complaint alleged that the reconstruction surgery on Rucker's right shoulder had been negligently performed. Rucker amended his complaint on February 19, 1999, to correct various civil rule deficiencies in the original complaint.

After the lawsuit was filed, Rucker filed various pleadings, including a motion for default judgment against Jewish Hospital. In denying Rucker's motion for default judgment, the trial court stated in its January 25, 1999, order, "The Court urges the Plaintiff to seek legal assistance in further prosecuting this action as further inappropriate Motions will

result in the Court's consideration of attorney's fees and other sanctions against any offending party." Similarly, in its January 22, 1999, order denying Jewish Hospital's motion to dismiss Rucker's complaint based upon various Civil Rule violations, the trial court stated that "IT IS FURTHER ORDERED that any further deviations from the Kentucky Rules of Civil Procedure will not be tolerated by the Court and same shall be subject to appropriate rulings. The Plaintiff is urged, once again, to retain counsel to assist him in this action as strict adherence to the above stated rules are commanded."

On March 3, 1999, Dr. Ramsey and Nurse Evans filed a motion for summary judgment. On May 6, 1999, the trial court entered an order denying the motion for summary judgment; however, the order further stated that

> [t]he Plaintiff shall have sixty (60) days from the date of this order to retain and disclose, pursuant to Civil Rule 26, the expert witness he intends to use at the trial of this action. Without such expert testimony, Plaintiff cannot prove causation and the Court would have no choice but to dismiss this action. The Court will entertain Defendants' renewed Motion for Summary Judgment and/or to Dismiss no sooner than sixty (60) days from the date of this Order.

Rucker failed to disclose his expert within the sixty day period imposed by the trial court, and on July 19, 1999, the trial court entered an order granting Dr. Ramsey and Nurse Evans's motion for summary judgment.[1] Rucker thereafter filed a

[1]On July 19, 1999, the same day summary judgment was granted to Dr. Ramsey and Nurse Evans, Rucker filed a document captioned "Plaintiff's Compliance with Court's Order, Entered May 6, 1999" (continued...)

motion to alter, amend, or vacate the summary judgment order, which was denied by the trial court by order dated July 29, 1999. Rucker thereafter filed Appeal No. 1999-CA-002049-MR. On July 14, 1999, Jewish Hospital filed a motion for summary judgment. On August 16, 1999, the trial court entered an order granting Jewish Hospital's motion for summary judgment. Rucker thereafter filed Appeal No. 1999-CA-002081-MR. Rucker's appeals were subsequently ordered consolidated and now addressed by us.

First in order to qualify for summary judgment the movant must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The standard of review of a summary judgment on appeal is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should only be used when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant. Id. at 483 (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)). A party opposing a properly supported motion for summary judgment cannot defeat it without

[1](...continued)
wherein he stated "Plaintiff hereby names Dr. Thomas Loeb his expert witness."

presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Steelvest, 807 S.W.2d at 482.

Expert testimony is necessary to establish negligence in medical malpractice cases, unless the negligence is so apparent that a layperson with general knowledge would have no difficulty in recognizing it. Maggard v. McKelvey, Ky. App., 627 S.W.2d 44, 49 (1981); Harmon v. Rust, Ky., 420 S.W.2d 563 (1967); Jarboe v. Harting, Ky., 397 S.W.2d 775 (1965); Johnson v. Vaughn, Ky., 370 S.W.2d 591 (1963). Rucker contends that in this case he need not produce an expert witness because his case falls within the *res ipsa loquitur* exception in that a layperson would have no difficulty in recognizing the malpractice. We disagree.

Perkins v. Hausladen, Ky., 828 S.W.2d 652, 654 (1992) throughly addressed *res ipsa loquitur* issues as follows:

> As applied to this case the term [*res ipsa loquitur*] means nothing more than whether the facts and circumstances are such that negligence can be inferred, even in the absence of expert testimony. As Prosser explains, *res ipsa loquitur* is a "Latin phrase, which means nothing more than the thing speaks for itself," and is simply "[o]ne type of circumstantial evidence." *Prosser and Keeton on Torts*, Sec. 39 (5th ed. 1984). Speaking to how the doctrine applies to the "question of duty . . . in cases of medical malpractice," *Prosser* advises that "ordinarily" negligence cannot be inferred simply from an "undesirable result"; expert testimony is needed. Id. at 256. But there are two important exceptions, one involving a situation where "any layman is competent to pass judgment and conclude from common experience that such things do not happen if there has been proper skill and care";

illustrated by cases where the surgeon leaves a foreign object in the body or removes or injures an inappropriate part of the anatomy. Id. The second occurs when "medical experts may provide a sufficient foundation for *res ipsa loquitur* on more complex matters." Id. at 257. . . .

Kentucky cases follow the same approach as *Prosser* enunciates. Butts v. Watts, Ky., 290 S.W.2d 777, 778 (1956) held that "evidence of a technical character" sufficient to sustain the plaintiff's case could be found in "an admission of the defendant, Dr. Watts," even though the plaintiff had no expert witness. It quotes with approval from Goodwin v. Hertzberg, 91 U.S. App. D.C. 385, 201 F.2d 204, 205 (D.C. Cir.1952), a case with a factual scenario analogous to the present one, in which a "surgeon in performing an operation wherein it was necessary to use care not to perforate the patient's urethra" succeeded in doing so. We stated:

> "It is immaterial that no expert testify that appellee acted negligently."

Other Kentucky cases somewhat similar in character are Jewish Hospital Association of Louisville, Ky. v. Lewis, Ky., 442 S.W.2d 299 (1969), holding *res ipsa loquitur* applied where there was extensive bleeding following a catheterization procedure; Neal v. Wilmoth, Ky., 342 S.W.2d 701 (1961), holding *res ipsa loquitur* applied where the dentist's drill slipped off the tooth; Meiman v. Rehabilitation Center, Ky., 444 S.W.2d 78 (1969), holding *res ipsa loquitur* applied where a bone was broken during therapy treatment; and Laws v. Harter, Ky., 534 S.W.2d 449 (1976), holding that *res ipsa loquitur* applied where a sponge was left in the patient during a surgical procedure. In all of these cases an inference of negligence was sufficiently supplied by medical testimony of record even though the plaintiff had no expert witness to opine that the conduct fell below the standard of acceptable professional care. In Jarboe v. Harting, Ky., 397 S.W.2d 775, 778 (1965), addressing the "general rule" that "expert testimony is

> required in a malpractice case to show that the defendant failed to conform to the required standard," we state:
>
> > "However, it is a generally accepted proposition that the necessary expert testimony may consist of admissions by the defendant doctor. [Citations omitted]. And there is an exception to the rule in situations where the common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts."
>
> . . . .
>
> We agree with the trial court that the doctrine of *res ipsa loquitur* does not apply in this case. To the contrary, Rucker's shoulder surgery involved medical techniques entailing highly technical operating procedures and risks. Laypersons do not have sufficient knowledge of the surgical techniques, orthopedic devices, and the level of medical skills required to be exercised by a surgeon to comply with his duty of care to the patient in this type of shoulder reconstruction operation. Given the relative complexity of the surgical procedures involved in this case, we are persuaded that there was not negligent conduct so apparent that a lay person with general knowledge would have no difficulty in recognizing it. It follows that expert medical testimony was absolutely necessary to demonstrate any breach of duty by the defendants. See Perkins v. Hausladen, Ky., 828 S.W.2d 652 (1992).

Next, Rucker argues that the trial court erred in granting summary judgment prior to his obtaining crucial discovery information. However, the only "crucial discovery"

Rucker refers to in his brief is "Dr. Ramsey's admissions." Dr. Ramsey, however, responded to Rucker's request for admissions and, as he has throughout this case, vehemently denied any breach of duty in his treatment of Rucker. There is not a reasonable probability that Ramsey would have, in the absence of the summary judgment order, made such an admission. We disagree that there were unresolved discovery issues which would prevent the trial court from entering summary judgment.

Next, Rucker contends that the trial court erred in granting summary judgment prior to his having an opportunity to respond to the appellees' summary judgment pleadings. We note, however, that the trial court's May 6, 1999, order gave Rucker sixty days in which to disclose his expert witness in the case. This was adequate time for Rucker to have responded to the appellees' summary judgment pleadings.

Next, Rucker contends that the trial court abused its discretion in denying his motion for default judgment. While Rucker's notice of appeal in Appeal 1999-CA-002049-MR does not identify the trial court's January 25, 1999, order denying Rucker's motion for default judgment in his notice of appeal, we will nevertheless briefly address the issue. Dr. Ramsey and Nurse Evans were served with process on December 4, 1998, and their Answer was not filed until January 22, 1999, -- 49 days later. However, between the time of service and the time their Answer was filed, Dr. Ramsey and Nurse Evans obtained an extension of time from the trial court in which to file their Answer upon the grounds that after the suit was filed, Ramsey and

Evans were advised by Rucker that he would voluntarily dismiss all claims against them.

Default judgments are not favored as a means for resolving litigation. The trial court is vested with broad discretion in granting or denying a motion for default judgment, and its judgment will not be disturbed unless that discretion has been abused. S.R. Blanton Development, Inc. v. Investors Realty and Management Co., Inc., Ky. App., 819 S.W.2d 727, 730 (1991). Given Ramsey and Evans's reason for not having answered the complaint, the extension of time granted to file their Answer, and the relative inequities and prejudice attendant with granting a default judgment in this case, we conclude that the trial court did not err in denying Rucker's motion for default judgment.

Next, Rucker contends that the trial court erred when it refused to accept his naming of an expert witness subsequent to the time permitted by the trial court's May 6, 1999 order. We disagree.

Rucker's July 19, 1999, filing was captioned "Plaintiff's Compliance With Court's Order Entered May 6, 1999." However, the trial court's May 6 order requiring Rucker to name his expert witness was, in effect, an order requiring Rucker to comply with CR 26 - which was specifically referred to in the order - and respond to the appellees' discovery request that Rucker provide not simply the name of his expert but, in addition, the substance of the facts and opinions to which the expert was expected to testify. See CR 26.02(4)(a)(i). Rucker's July 19, 1999, filing was limited to the statement that Rucker

"hereby names Dr. Thomas Loeb as his expert witness."[2] The filing did not, however, indicate - much less contain an affidavit - that Dr. Loeb was of the opinion or intended to testify that Dr. Ramsey or Nurse Evans breached their duty of care in their medical treatment of Rucker. Hence, even following Rucker's July 19, 1999, filing, he had still failed to produce affirmative evidence creating a genuine issue of material fact regarding whether the appellees had breached their duty of care.

We are mindful that summary judgment should not be used as a sanctioning tool for failure to comply with scheduling and discovery orders, Ward v. Housman, Ky. App 809 S.W.2d 717 (1991); Poe v. Rice, Ky. App. 706 S.W.2d 5 (1986); however, that is not the situation here. As previously noted, under the facts of this case, expert medical testimony is necessary for Rucker to prevail in this medical malpractice case. At the completion of discovery, Rucker had failed to present the testimony of an expert witness alleging that the appellee's had breached any duty owed to Rucker. Rucker instead relied upon the doctrine of *res ipsa loquiter*. Meanwhile the trial court granting an additional 60 days, Rucker again failed to produce the expert medical testimony imperative to his malpractice claim.

It is uncontested that the appellees filed properly supported summary judgment motions. A party opposing a properly supported summary judgment motion cannot defeat it without

[2]The filing did note that Dr. Loeb had "made a recommendation for the hardware to be removed" and that "Dr. Thomas Loeb will remove the hardware and see plaintiff about (4) weeks after surgery to determine what other surgical procedures, if any, that may be necessary to correct plaintiff's injuries."

presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). In light of the properly supported summary judgment motions, the onus was upon Rucker to produce expert testimony showing that there was a genuine issue of material fact regarding the appellees' breach of duty. Rucker failed to meet his obligation. Clearly the trial court properly entered summary judgment because, based upon the record, there was not a genuine issue of material fact regarding whether the appellees had breached their duty of care to Rucker. Moreover, because Rucker's belated filing "naming an expert" failed to cure this deficiency, we are persuaded that the trial court properly declined to vacate its prior order granting summary judgment on account of the filing. Rucker had previously been provided with a generous amount of time to produce his expert medical testimony, and the line had to be drawn somewhere. As much as we believe an alleged victim should have his day in court, we also believe the rules are there for a purpose and the trial court was quite generous in interpretating same with reference to Mr. Rucker.

Finally, Rucker contends that the cumulative errors he has identified denied him of his due process rights and, consequently, summary judgment was improper. We disagree that there was any error, and, consequently, reject Rucker's premise that there was cumulative error.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald Rucker, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEES:

JEWISH HOSPITAL HEALTHCARE SERVICES, INC.

Russell H. Saunders
Louisville, Kentucky

WILLIAM C. RAMSEY AND JEANNIE EVANS:

William P. Swain
Louisville, Kentucky