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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001735-MR

JERRI B. HORN AND
ROY T. HORN

APPELLANTS

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 02-CI-00112

ROBERT J. THOMAS, M.D.

APPELLEE

OPINION

AFFIRMING IN PART - REVERSING IN PART AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.
GUIDUGLI, JUDGE. Jerri B. and Roy T. Horn (hereinafter "the
Horns") appeal from a summary judgment of the Greenup Circuit
Court in their medical malpractice action against Robert J.
Thomas, M.D. For the reasons stated herein, we reverse the
summary judgment, affirm the denial of the Horns' motion for
leave to add an expert witness, and remand the matter for
further proceedings.

On August 24, 2000, Jerri Horn (hereinafter "Mrs. Horn") experienced shortness of breath and was taken to the emergency room of Our Lady of Bellefonte Hospital in or near Greenup County, Kentucky. A chest x-ray was performed, and a radiologist stated that the x-ray indicated suspected right mid-lung atelectasis (collapsed lung). The report recommended follow-up to ensure that a mass in the lung was not the underlying cause of the atelectasis.

Mrs. Horn was admitted to the hospital, and was treated by Dr. Robert J. Thomas (hereinafter "Dr. Thomas"). A CT scan was performed, the impression of which indicated probable atelectasis or scar tissue, with recommended evaluation in 4 - 6 weeks. Mrs. Horn was released from the hospital on August 25, 2000, and later had a stress test as requested by Dr. Thomas.

Mrs. Horn had a follow-up visit with Dr. Thomas on September 8, 2000. Further testing was ordered, which was conducted on September 11, 2000. Another office visit was conducted on September 15, 2000, about which time Dr. Thomas believed Mrs. Horn may have had bronchospasm or asthma. She was given medication and told to return for another office visit on October 13, 2000.

Mrs. Horn did not keep the October 13, 2000 appointment. She would later state that she missed the

appointment because her condition had not changed, and because she had never been made aware of the possibility that she had a mass in her lung.

In March, 2001, Mrs. Horn had a chest x-ray in preparation for a gynecological procedure. This x-ray, and a subsequent CT scan indicated the presence of masses on both of her lungs. The masses were determined to be adenocarcinoma, or lung cancer.

Mrs. Horn was evaluated by Dr. Edward Setser, a cardiothoracic surgeon. Dr. Setser opined that the primary tumor had metastasized and that Mrs. Horn was not a candidate for surgery. Mrs. Horn was also referred to Dr. Gerrit Kimmey, an oncologist. Dr. Kimmey agreed with Dr. Setser that the cancer was inoperable and terminal. Mrs. Horn has undergone chemotherapy and drug therapy which the record indicates has had some success in extending her life beyond the original prognosis.

On February 28, 2002, the Horns filed the instant action against Dr. Thomas alleging negligence. A number of procedural matters were undertaken, and discovery depositions were completed by May, 2003. Shortly thereafter, on May 26, 2003, Mrs. Horn, through counsel, sought leave of court to add an additional expert witness for the apparent purpose of establishing if the cancer existed in August, 2000, and if so,

opining as to its stage. On May 30, 2003, the motion was denied.

In July, 2003, Dr. Thomas, through counsel, filed a motion for summary judgment. As a basis for the motion, Dr. Thomas maintained that Mrs. Horn could produce no proof as to causation. That is, Dr. Thomas argued that even if he breached a duty to Mrs. Horn, the record contained no proof upon which Mrs. Horn could rely to show that the alleged breach caused the cancer to move from a more curable form (stage I) to the incurable form (stage IV) of her diagnosis. As such, he maintained that he was entitled to have the action dismissed. Upon considering the argument, and the Horns' responsive brief, the court rendered a summary judgment in favor of Dr. Thomas on July 25, 2003. This appeal followed.

The Horns now argue that the trial court committed reversible error in granting Dr. Thomas's motion for summary judgment. They maintain that sufficient proof exists in the record to prove each element of their negligence claim, and that when the record is viewed in a light most favorable to them it was sufficient to rebut Dr. Thomas's motion for summary judgment. Accordingly, they maintain that the trial court erred in terminating the action.

We must first address Dr. Thomas's assertion that the instant appeal must be dismissed for failure to comply with CR

76.12(4)(c)(v). It provides in relevant part that the appellant's brief "shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Since the Horns' argument fails to comply with this provision, Dr. Thomas argues that the appeal must be dismissed.

We are not persuaded by this argument. Dismissal for failure to comply with CR 76.12(4)(c)(v) is discretionary, not mandatory. Cornette v. Holiday Inn Express, Ky. App., 32 S.W.3d 106 (2000).¹ This is especially true in appeals from summary judgment, because the trial court proceeding did not continue to fruition. Id. As such, and for the reasons stated below, we will not rely on CR 76.12(4)(c)(v) as a basis for dismissing the Horns' appeal.

Having closely examined the record, the law, and the arguments of counsel, we agree that summary judgment was not warranted, and accordingly reverse. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

¹ Cornette addressed identical language found in CR 76.12(4)(c)(iv), which was subsequently amended to CR 76.12(4)(c)(v).

a judgment as a matter of law." CR 56.03. "The record must be viewed in a 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 Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." Id. Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

The elements of a medical malpractice action are the same as any negligence action, i.e., duty, breach, causation, and injury. Grubbs ex rel. Grubbs v. Barbourville Family Health Center, P.S.C., Ky., 120 S.W.3d 682, 687 (2003), citing Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W.2d 245 (1992). Without entering into a protracted analysis of medical negligence, suffice it to say that, "[I]n Kentucky, if the physician's service falls below the expected level of care and skill and this negligence proximately caused injury or death, then all elements of a malpractice action have been met."

Grubbs at 688, citing Reams v. Stutler, Ky., 642 S.W.2d 586 (1982).

For purposes of the instant appeal, Dr. Thomas acknowledges that he owed a duty to Mrs. Horn. On the element of breach, the testimony of Dr. Rudy may be relied upon to create a genuine issue of material fact. In addressing counsel's deposition question regarding whether Dr. Thomas allegedly breached a duty to fully apprise Mrs. Horn of her need for a follow-up examination, Dr. Rudy stated: ". . . it's below the standard [of care] not to have made her understand or show good effort to make her understand. There is a point where the ball's [sic] in her court. I don't see evidence in this case that we got to that point."

While we make no evaluation as to the sufficiency of this assertion as proof at trial, it does represent a question of fact upon which reasonable minds could differ. As such, the element of breach cannot be relied upon to support a summary judgment.

The corpus of Dr. Thomas's summary judgment argument below was grounded on the elements of causation and damages. The trial court apparently found as persuasive his claim that the proof gave rise to no genuine issues as to these elements. We do not share the trial court's conclusion on this issue. Dr. Kimmey, whom the Horns designated as an expert witness,

stated in deposition that he assumed within a reasonable degree of medical probability that Mrs. Horn had lung cancer in August or September of 2000. Again, the question is not whether this is compelling evidence, nor whether the trial judge believed that it would lead one party would prevail at trial, Steelvest, supra, but whether there exists a genuine issue of material fact. Id. Whether Mrs. Horn had lung cancer in September 2000, and if so, whether the cancer had not yet progressed to stage IV, is at the heart of the Horns' claim.

Dr. Thomas is entitled to summary judgment only if "his right to judgment is shown with such clarity that there is no room left for controversy." Steelvest, 807 S.W.2d at 842, citing Isaacs v. Cox, Ky., 431 S.W.2d 494 (1968). Since *some* evidence exists in support of the assertion that Mrs. Horn had lung cancer in August or September of 2000, even if the evidence is tenuous, we believe the trial court erred in terminating the action. This evidence may be offered in support of both the causation and damages elements of the Horns' claim.

The Horns also argue that the trial court abused its discretion when it denied their motion for leave to add an additional expert witness. They claim that no prejudice would have been suffered by Dr. Thomas by the court granting the motion, and that they should be entitled to add an expert in support of their claim.

We find no error on this issue. The trial court ordered all discoveries to be concluded by May 14, 2003. On May 23, 2003, the Horns moved for leave to add an additional expert witness. It appears from the record that they had chosen no particular witness to add, but rather sought 90 days in which to locate one.

"An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" Farmland Mutual Insurance Company v. Johnson, Ky., 36 S.W.3d 368 (2000). In the matter at bar, the trial court's decision not to extend the discovery period cannot reasonably be regarded as arbitrary, unreasonable, unfair, or unsupported by sound legal principles, given that the Horns had approximately fifteen (15) months after filing the complaint in which to complete discovery. Finding an abuse of discretion under the facts at bar would be tantamount to concluding that a trial court may not enforce its own orders. While the court could have exercised its discretion and granted the motion, its refusal to do so does not constitute an abuse of discretion. Accordingly, we find no error on this issue.

For the foregoing reasons, we reverse the summary judgment, affirm the denial of the motion for leave to add an expert witness, and remand this matter for further proceedings.

ALL CONCUR.

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