

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000390-MR

THERESA GERSTLE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 07-CI-009928

GREG TAYLOR; DEBORAH
BECCIA; STATE FARM INSURANCE
COMPANY; AND LIBERTY MUTUAL
INSURANCE COMPANY

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, COMBS, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Theresa Gerstle, proceeding *pro se*, has appealed from the Jefferson Circuit Court's judgment entered November 23, 2009, following a jury trial and from an opinion and order entered February 3, 2010, denying her motion to set aside the verdict. On appeal, Gerstle argues that the trial court improperly denied her motion to continue the trial and should have admitted certain medical

records into evidence. Having thoroughly reviewed the record and the applicable law, we affirm.

On October 6, 2005, Gerstle was involved in a motor vehicle accident in Jefferson County. Greg Taylor was operating a vehicle owned by the passenger, Deborah Beccia, when he failed to stop at a stop sign and crossed the road in front of Gerstle's vehicle, causing the accident. State Farm Insurance Company provided the insurance on Beccia's vehicle, while Liberty Mutual Insurance Company insured Gerstle's.

On October 8, 2007, Gerstle filed a *pro se* complaint against Taylor, Beccia, State Farm, and Liberty Mutual, asserting claims for personal injuries arising from the motor vehicle accident and for bad faith. The trial court later dismissed Liberty Mutual as a defendant and bifurcated the bad faith claim from the tort claim. Because of the nature of Gerstle's arguments in her brief, we will provide some detail about the conduct of the pre-trial proceedings.

Throughout this time, the parties engaged in discovery. Gerstle filed her response to State Farm's request for admissions on February 27, 2008. On May 1, 2008, she requested an extension of time to answer interrogatories, citing a possible conflict of interest with the defendant's attorney. She was permitted until June 5, 2008, to file her responses. On June 4, 2008, Gerstle filed another motion for an extension to respond to the discovery request and other pending motions. She indicated that she had recently retained attorney Frank Yates to represent her

in the action. The court also granted this motion, allowing her until July 7, 2008, to respond to the outstanding matters.

In November 2008, Taylor and Beccia moved to be dismissed as defendants, arguing that they never received summons and that Gerstle had taken no affirmative steps to prosecute the action against them. The motion was initially denied following a hearing in December, with the court noting that Gerstle had retained an attorney. Taylor and Beccia later renewed their motion to dismiss, stating that Gerstle's attorney had not provided them with detailed information regarding the nature and extent of her claims along with supporting medical documentation. The only settlement demand they received did not include any supporting documentation. When Gerstle's attorney failed to appear at the hearing on the motion or to file any objection to the motion, the trial court granted the motion and dismissed Taylor and Beccia from the case. However, Gerstle, through her attorney, filed a motion to set aside that order on April 16, 2009. In the motion, Gerstle cited her attorney's confusion regarding when the motion was to be heard. She also stated that her attorney had received medical records from University of Louisville Hospital, which were mailed to opposing counsel, and was in the process of obtaining records from several chiropractors Gerstle had seen as a result of her injury. The trial court granted the motion on April 29, 2009.

Following that ruling, Taylor and Beccia filed an answer to the complaint and filed a notice to take Gerstle's deposition, which was scheduled for July 7, 2009. On July 8, 2009, they filed a notice continuing the deposition until

August 13, 2009. Also on July 8, Taylor and Beccia moved the court for a trial date. Based on this motion, the court scheduled a jury trial for November 17, 2009, and set up a schedule for the identification of expert witnesses, the filing of any motions to dismiss or for summary judgment, and for the taking of depositions. We also note that Gerstle filed her answers to interrogatories on July 13, 2009. In her answers, Gerstle indicated that she was still in the process of collecting hospital, doctor, and chiropractor bills.

On August 13, 2009, Taylor and Beccia filed motions requesting costs and to compel Gerstle to complete her deposition. They stated that Gerstle arrived late to the first deposition and then had to leave early for an appointment. For the continuation deposition, her attorney arrived late, but Gerstle did not appear at all. The trial court granted the motions, awarded costs, and ordered Gerstle to appear at the deposition scheduled for August 20, 2009.

On October 19, 2009, Taylor and Beccia filed their pretrial compliance and moved the court to compel Gerstle to respond to their supplemental request for production of documents they mailed on August 31, 2009. All of the documents had been requested during the August 20 deposition. The court granted the motion on October 26, 2009, and ordered the documents to be produced in seven days. The record does not contain Gerstle's response to this discovery request.

On October 22, 2009, less than one month before the trial, Gerstle filed a motion to continue the trial, stating that she had not received documentation

from the defendants and that her attorney was in the process of obtaining medical records from several chiropractors. The trial court denied the motion on October 26, 2009. Gerstle then filed her pretrial compliance on November 10, 2009.

On November 9, 2009, Taylor and Beccia filed a trial brief, along with motions in limine to preclude Gerstle from presenting any medical testimony because she had not deposed any of her treating medical providers, had not named any expert witnesses, and had not provided any medical expenses. They also moved to preclude any reference to Beccia because she was not driving her vehicle at the time of the accident. The trial court granted the motion related to Beccia.

On November 12, 2009, Gerstle filed a second motion to continue the trial, which was to be heard the day before the trial was scheduled to begin. In the motion, Gerstle stated that she was stressed due to her bankruptcy proceedings and the foreclosure on her home. She also stated that she had an ear infection and would not be present at the trial. The trial court heard arguments related to the motion on November 16, but opted to pass ruling on it until the next day because another trial had been scheduled to begin. The next morning, however, the trial court indicated that the other case had settled, meaning that Gerstle's case was able to be tried that day. The court then heard arguments related to the motion to continue.

Gerstle was not present in the courtroom, but her attorney stated that she had been suffering from an ear infection since September and produced office notes from Family Health Center reflecting that she had been seen in triage the

prior day. Other records indicated that Gerstle had been seen for ear complaints in August 2009. Her attorney also reported that Gerstle was at her doctor's office that morning due to her ear infection and would not be able to be in court that morning. He suggested that the case be reassigned for mediation.

Taylor objected to the continuance, noting that this case was filed in 2007 and arose from a 2005 motor vehicle accident. He stated that it had been extremely difficult to get any proof in this case, including both medical and business records. He argued that the pattern of delay in this case was unduly prejudicial. In response, Gerstle's attorney stated that Gerstle had been lax in getting work done for this case, but that he had been able to obtain records from several medical providers. He admitted that it was difficult to get Gerstle to focus on this case due to her pending bankruptcy actions. He also reiterated her ear problems, stating that she needed rest and medication.

The court reviewed the file and noted that many of the delays occurred before Gerstle's attorney made his appearance in the case, but indicated that this did not diminish the problems with getting ready for the trial. It noted that Gerstle's ear problems had been present for several months. Furthermore, the court looked at the length of time the case had been in the system, recognizing that the accident occurred in 2005, that suit was filed in 2007, and that it was presently the end of 2009. Therefore, the court denied the motion to continue, stating that the time had come for trial.

When the matter came back on the record, attorney Yates indicated that he had spoken to Gerstle and that she was on the way to court from the doctor's office. Yates then moved to withdraw as counsel. In his written motion, Yates stated that he had not been able to properly prepare the case for trial due to Gerstle's previously expressed problems with stress and her health. The court granted the motion to withdraw and ruled that the case would continue with Gerstle representing herself. The court reasoned that Gerstle had filed the suit *pro se*, Yates had not been in the case for long, and Gerstle had previous experience in bringing cases herself, so that she would be able to proceed in this case as well.

When Gerstle appeared in the courtroom, she again moved to continue the trial, arguing that she had no counsel, that she could not hear due to her ear problems, that she had problems preparing for this trial due to her bankruptcy proceedings. We note that she was wearing what appeared to be a sweatshirt, and she later stated that she had been at her doctor's office for a previously scheduled appointment. Despite the trial court's decision to again decline to continue the trial, Gerstle repeatedly requested a continuance, citing her lack of documents, including medical records, copies of depositions, or even a copy of her attorney's case file. She further admitted that she did not have all of the medical records and needed an extension to obtain those records. Gerstle then went on to ask the court about various procedural aspects of the trial, including the filing of medical records. The court indicated that medical records must be properly authenticated before they may be presented to the jury, but that Gerstle could use

unauthenticated documents to refresh her memory about the treatment she sought when she testified. This discussion went on for a good deal of time before the trial began.

At trial, Gerstle was the only witness to testify. She testified that she sought treatment for injuries to her back she claimed were due to the motor vehicle accident. She specifically testified that she received two bills for chiropractic care, one for \$1,585.00 and another for between \$700.00 and \$800.00. Because she was unable to properly authenticate any of the medical records she sought to enter into evidence, the court would not permit them to be admitted.

At the conclusion of the trial, the trial court denied Taylor's motion for a directed verdict, leaving it to the jury to weigh the evidence she presented. The jury ultimately found that Gerstle had not met the \$1,000.00 threshold in reasonable medical expenses. *See* Kentucky Revised Statutes (KRS) 304.39-060(2)(b) ("In any action of tort brought against the owner, registrant, operator or occupant of a motor vehicle . . . , a plaintiff may recover damages in tort for pain, suffering, mental anguish and inconvenience because of bodily injury, sickness or disease arising out of the ownership, maintenance, operation or use of such motor vehicle only in the event that the benefits which are payable for such injury as 'medical expense' or which would be payable but for any exclusion or deductible authorized by this subtitle exceed one thousand dollars (\$1,000)[.]"). Accordingly, the jury found in favor of Taylor, and on November 23, 2009, the trial court

entered a judgment in accordance with the jury's verdict and dismissed Gerstle's claims with prejudice.

Following entry of the judgment, State Farm moved for summary judgment on the bad faith claim. For her part, Gerstle moved the court to set aside the verdict or declare a mistrial, arguing that the trial court was biased against her, that she should have been granted a continuance of the trial to obtain new counsel and obtain the necessary documents to support her claim, and that she should have been permitted to introduce her deposition and medical records. She also argued that her uncontradicted testimony established the \$1,000.00 threshold, contradicting the verdict. Taylor and Beccia objected to Gerstle's motion, pointing out that she had not met any of the deadlines for identifying witnesses or taking depositions. Furthermore, regarding the chiropractic bills, Gerstle did not offer the billing statements, nor did she testify as to the dates or timeframes they encompassed or that they were related to treatment for the accident.

In an opinion and order entered February 3, 2010, the trial court denied Gerstle's motion to set aside, holding that Gerstle failed to demonstrate that the court was biased or that there was insufficient evidence to support the jury's verdict. The court also granted State Farm's motion for summary judgment on the bad faith claim and dismissed Gerstle's action against State Farm. This appeal follows.

In her brief, Gerstle raises two issues, one related to the denial of her motion to continue the trial and the second related to an evidentiary issue. Taylor

and Beccia (hereinafter “appellees”) dispute both of Gerstle’s arguments and assert that the trial court did not commit any error or abuse its discretion in either ruling. State Farm also filed a brief, which is limited to whether the trial court properly entered the summary judgment in its favor. State Farm points out that Gerstle did not address this issue in her brief, thereby waiving her right to appeal that ruling, but also argues that the trial court judgment should stand and, as such, is fatal to her bad faith claim.

We shall first consider whether the trial court abused its discretion in denying Gerstle’s motion to continue the trial. In support of this argument, Gerstle states that her attorney withdrew on the morning of trial, depriving her of her due process right to representation of her own choice. Appellees argue that Gerstle was not entitled to a continuance for several reasons, including her failure to file an affidavit as required by Kentucky Rules of Civil Procedure (CR) 43.03 and her fault in bringing about the withdrawal. Furthermore, appellees correctly point out that Gerstle has no constitutional right to counsel in this civil action, noting that this entitlement is limited to indigent criminal defendants and is only extended in civil proceedings under very limited circumstances not present here. We agree that the trial court properly denied Gerstle’s motion for a continuance.

“[A]n application for a continuance is addressed to the sound discretion of the court and the action of the court will not be disturbed unless that discretion is abused.” *Lewis v. Liming*, 573 S.W.2d 365 (Ky. 1978). *See also Hunter v. Commonwealth*, 869 S.W.2d 719, 720-21 (Ky. 1994); *Stallard v.*

Witherspoon, 306 S.W.2d 299, 300 (Ky. 1957); *Kentucky Farm Bureau Mut. Ins. Co. v. Burton*, 922 S.W.2d 385 (Ky. App. 1996). The test for abuse of discretion is “whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citing *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000)).

We have reviewed the cases Gerstle cited in her brief, and we do not agree that those authorities mandate a reversal in this case. First, we note that in *Griffin v. Russell*, 161 Ky. 471, 170 S.W. 1192 (1914), the defendant supported his motion to continue with an affidavit, while Gerstle did not. Gerstle relies on a decision of the former Court of Appeals in *Cox v. Spears*, 181 Ky. 363, 206 S.W. 20 (1918), for its statement that the plaintiff should have had an opportunity to present her case after her attorney withdrew. However, the circumstances presented in *Cox* are markedly different from those presented in the current matter:

An application for a continuance is always addressed to the sound discretion of the trial judge; but *where the facts are such as to show that the complaining party is not in fault, or some unavoidable casualty has intervened, a reasonable opportunity should be granted for the preparation of the case.* Here the plaintiff’s only attorney, Mr. Adkins, had withdrawn from the practice of law and entered the coal business, which necessarily took him away from the courthouse. So far as the record discloses, Mrs. Cox did not know of this, and she had had very little, if any, experience in court proceedings. She was relying upon her attorney to attend to the preparation of the cause. The attorney states on oath that he did not know of the motion to submit the case at the time it was submitted, and did not learn of the submission until about the time judgment was entered. These facts considered,

it appears that Mrs. Cox was entitled to have the submission set aside and the case continued for preparation. [Emphasis added.]

Id. at 21.

Likewise, in *Bohannank v. Mills*, 2 Ky. Op. 597, 1868 WL 6806 (1868), the former Court of Appeals held that a continuance should have been granted because the record was unclear as to the circumstances of the attorney's withdrawal.

[A]s on the calling of the cause the plaintiffs [sic] counsel had their names stricken from it, the court should have continued the cause with a rule against the plaintiff to prosecute his suit; this would be but fair to him if his counsel for justifiable cause, unknown to him, should abandon the case, and but fair to the court to ascertain whether practitioners in his court for an unjustifiable cause or censurable practice has [sic] adopted such a course.

Id. at 598.

In *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991), the Supreme Court of Kentucky provided a list of factors to consider in determining whether a continuance is appropriate:

Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Id. at 581. We have considered these factors in our review of the trial court's decision.

Based upon our review of the record, we hold that the trial court did not abuse its considerable discretion in denying Gerstle's motion for a continuance due to the withdrawal of her attorney, or for any of the other reasons she alleged orally on the record or by written motion. The record establishes that Gerstle has considerable experience in litigating *pro se* cases, that she instituted this case with the filing of a *pro se* complaint, and that she did not retain an attorney until almost a year into the case. And even then she continued to file motions and other documents herself. As such, we perceive no prejudice to the court's requiring Gerstle to represent herself at trial.

Furthermore, Yates directly attributed the reason for his withdrawal to Gerstle's laxity in providing him with needed information that would allow him to prepare for trial. Yates informed the court that he had problems getting Gerstle to focus on this case, both due to her health issues and pending bankruptcy proceedings. By the date of trial, the case had been pending for two years, and the trial had been scheduled for several months, affording Gerstle more than enough time to obtain the necessary documents and expert proof to support her claim.

For all of these reasons, we must hold that the trial court, after patiently and thoughtfully considering all of Gerstle's arguments and the record, did not abuse its discretion in ordering the trial to proceed with Gerstle representing herself.

Next, we shall consider whether the trial court properly disallowed the introduction of Gerstle's medical evidence. The trial court ruled that Gerstle could

not introduce unauthenticated records, but could testify regarding her treatment and what she was billed for that treatment. Gerstle asserts that she should have been permitted to introduce those documents under the business records exception in Kentucky Rules of Evidence (KRE) 803(6). However, this argument is essentially another ground Gerstle proposes for continuing the trial. She argues that her failure to comply with KRE 803(6) arose through no fault of her own, and therefore she should be permitted a continuance in order to comply with the rule. We reject this argument.

KRE 901(a) provides that an item must be authenticated as a condition precedent to admissibility, and that this may be “satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” The Supreme Court of Kentucky addressed this rule of evidence in *Thrasher v. Durham*, 313 S.W.3d 545, 549 (Ky. 2010), explaining:

Under KRE 901, a document must be authenticated before it can be admitted into evidence. While the proponent’s burden is slight, it is nonetheless real and requires a showing “sufficient to support a finding that the matter in question is what its proponent claims.” KRE 901(a); *Johnson v. Commonwealth*, 134 S.W.3d 563 (Ky. 2004). This burden may be met in any number of ways, including circumstantial evidence permitting an inference that the document is what it is represented to be.

“On appellate review, the trial court’s finding of authentication is reviewed for abuse of discretion.” *Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky. 2004).

Gerstle did not provide any foundation for the records she sought to introduce into evidence. Nor did she or her attorney identify any documentary evidence she planned to introduce in her pretrial compliance. Nevertheless, the trial court allowed Gerstle to use the records at issue to refresh her recollection during her testimony about what treatment she received and about any billing statements she received. Therefore, we hold that the trial court did not abuse its discretion in disallowing the unauthenticated records to be admitted into evidence.

For the foregoing reasons, the judgment and order of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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