

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001005-MR

TINA MILLER

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 12-CI-00175

PAINTSVILLE HOSPITAL COMPANY, LLC,
D/B/A PAUL B. HALL REGIONAL MEDICAL
CENTER, AND UNKNOWN EMPLOYEES OF
PAINTSVILLE HOSPITAL COMPANY, LLC,
D/B/A PAUL B. HALL REGIONAL MEDICAL
CENTER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

CLAYTON, JUDGE: Tina Miller appeals the May 8, 2013 Johnson Circuit Court order granting summary judgment to Paintsville Hospital, LLC, D/B/A Paul B. Hall Regional Medical Center (hereinafter “Paintsville Hospital”). The trial court

determined that Miller failed to provide expert proof of a deviation from the standard of care and expert proof as to causation, which is required in Kentucky for a medical malpractice case. Further, the trial court denied Miller's motion for an extension of time to identify another expert as untimely. After careful consideration, we affirm.

FACTS

On April 18, 2009, Miller arrived at the emergency room of Paintsville Hospital with severe breathing problems and was admitted for treatment. At the time, she was not able to communicate. The emergency room physician ordered that she be intubated and placed on a ventilator. As such, Miller needed three IV lines – one in her right arm, one in her left forearm, and one in her right foot. Eventually, she was admitted to the intensive care unit with a diagnosis of acute respiratory failure. None of the physicians who treated her were employees of Paintsville Hospital.

Miller remained hospitalized from April 18, 2009, until May 6, 2009. She was suffering from respiratory distress secondary to congestive heart failure with severe chronic obstructive pulmonary disease. Miller was on a ventilator until May 2, 2009. She was then transferred from the intensive care unit to a hospital floor. On May 6, 2009, Miller was discharged to an extended care facility. While hospitalized, Miller developed a wound in her right leg, which is the subject of the medical negligence claim.

According to the record, in December 2011, Dr. Jerry Brackett informed Miller that Paintsville Hospital had been negligent in her treatment. On April 13, 2012, Miller filed a complaint against Paintsville Hospital and unknown employees of the hospital. But she never identified or sought to identify any employee of the hospital. Further, Miller never named any physician in this action.

After the complaint was filed, the trial court, on September 10, 2012, entered an order setting July 22, 2013, as the date for the jury trial. In addition, the trial court provided a scheduling order on October 8, 2012, requiring Miller to identify expert witnesses pursuant to Kentucky Rules of Civil Procedure (CR) 26 by December 1, 2012. The order also stated that expert depositions were to be completed by April 1, 2013. Miller later identified Dr. Brackett as her sole expert witness.

On September 28, 2012, Paintsville Hospital requested dates from Miller to schedule the discovery deposition with Dr. Brackett. The hospital asked two more times before making a motion on October 24, 2012, for an order from the trial court to demand that Miller produce Dr. Brackett for a deposition. Subsequently, the motion was withdrawn when Miller gave the date of December 5, 2012, for the deposition. However, this deposition was cancelled by Miller ostensibly because of Dr. Brackett's health. Paintsville Hospital then filed a second motion asking the trial court to order that Miller produce Dr. Brackett for a deposition.

Meanwhile, Dr. Brackett was the subject of an action before the Kentucky Board of Medical Licensure (hereinafter “KBML”). ON December 18, 2012, KBML entered an emergency order suspending Dr. Brackett’s license to practice medicine. (As an aside, Dr. Brackett and Miller shared the same legal counsel.)

Eventually, the deposition finally took place on February 14, 2013.

At

the deposition, Dr. Brackett stated that he was not critical of the nurses’ treatment of Miller and that the standard of care necessitated that Miller have a central line so that she could be intubated. Nonetheless, Dr. Brackett acknowledged that the decision to place a central line and the placement of it is the responsibility of a physician. Further, he opined that Paintsville Hospital was negligent because the wound would not have occurred without a deviation from the standard of care. But Dr. Brackett later observed during the deposition that Miller’s alleged injuries could have occurred without any negligence. The only reason for Dr. Brackett’s belief that the hospital deviated from the standard of care was the severity of Miller’s wound.

After the deposition, Paintsville Hospital filed a motion for summary judgment or in the alternative for a *Daubert* hearing on April 9, 2013. Regarding Dr. Brackett’s expertise, Paintsville Hospital pointed out that he is neither board-certified in any specialty nor eligible to sit for any board certification. Since 2003, he has worked at a variety of practices including multiple pain clinics, walk-in

weight loss clinics, spa-medical clinics, and general practice clinics. Moreover, as highlighted by Paintsville Hospital, the areas of medicine implicated in Miller's case are emergency medical care and acute in-patient medical care. Dr. Brackett admitted that he has not practiced acute medical care of any kind in the ten years prior to the deposition and has not worked in an emergency room since the early 1990's.

In the motion for summary judgment, Paintsville Hospital articulated that Dr. Brackett failed to establish that Paintsville Hospital deviated from the applicable standard of care or proximately caused Miller's alleged injuries; that Dr. Brackett was unqualified under Kentucky Rules of Evidence (KRE) 702; and, that Dr. Brackett's opinion failed to meet the *Daubert* standard.

Besides responding to the motion for summary judgment on May 2, 2013, Miller filed a motion for an extension of time to identify a new expert witness. The next day the trial court held oral arguments on the summary judgment motion. On May 8, 2013, the trial court entered its holding that because Dr. Brackett, Miller's expert witness, did not have an active medical license and also had other deficiencies in qualifications, his opinion was unreliable under KRE 702. Accordingly, the trial court excluded his testimony. Furthermore, the trial court denied Miller's motion for an extension of time as untimely. Finally, the trial court determined that Miller had failed to present expert proof of a deviation from the standard of care and expert proof of causation as required under Kentucky

law in medical malpractice cases. Therefore, the trial court granted Paintsville Hospital's motion for summary judgment. Miller now appeals from this decision.

On appeal, Miller argues that the trial court erred by denying her the opportunity to seek another medical expert after her original medical expert lost his medical license. She maintains that the trial court should have permitted her to seek another expert rather than granting Paintsville Hospital's motion for summary judgment.

In response to Miller's appeal, Paintsville Hospital argues that Miller attempted to rely on a medical expert who did not have a valid medical license, was completely unqualified to offer an expert medical opinion, and failed to provide any opinion sufficient to establish liability on the part of Paintsville Hospital, and consequently, the trial court's grant of summary judgment was proper.

ANALYSIS

As stated in *Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky. App. 2006), “[e]xcept in limited factual circumstances, however, the plaintiff in a medical negligence case is required to present expert testimony that establishes (1) the standard of skill expected of a reasonably competent medical practitioner and (2) that the alleged negligence proximately caused the injury.” Hence, for Miller to survive Paintsville Hospital's motion for summary judgment, she must produce expert evidence or summary judgment is proper. *Id.* (citation omitted).

Here, Miller only provided the testimony of a doctor who was unlicensed and did not have expertise in the areas of emergency medicine or acute in-patient emergency services. The record in this case shows that although Miller listed Dr. Brackett as her expert prior to the suspension of his medical license, it was suspended well before the deadline for the expert deposition to be completed – April 2013. Therefore, she both had knowledge of the license suspension before the deadline and an awareness of Dr. Brackett’s lack of qualification in the area of emergency medicine and/or acute in-patient medicine.

Additionally, Miller never argued that she was unaware of Dr. Brackett’s suspension or that Paintsville Hospital obstructed the discovery process. Thus, while his license was suspended in December 2012, Miller did not identify another expert following the suspension nor make a motion for an extension of time until May 2, 2013. In fact, the motion for an extension of time was made after Paintsville Hospital’s motion for summary judgment. To recap, Miller provides no reason for not securing another expert during the over four months after Dr. Brackett’s suspension preceding Paintsville Hospital’s summary judgment motion.

The Kentucky Supreme Court held in *Blankenship v. Collier*, 302 S.W.3d 665, 674 (Ky. 2010) (citation omitted) that “[w]hen it is evident that the plaintiff has not secured a single expert witness and has failed to make any expert disclosures after a reasonable period of time, there truly is a failure of proof and a

summary judgment motion is appropriate.” In the case at bar, we concur with the trial court, summary judgment was proper since Miller failed to identify one.

The remaining question, however, is whether a reasonable period of time had passed for Miller to identify an expert. We review this issue for an abuse of discretion. *Id.* at 668. Keeping in mind that the trial court has “broad power to control the use of the discovery process and to prevent its abuse,” we address the efficacy of the trial court’s decision to deny Miller’s motion for an extension of time to seek another expert. *See Hoffman v. Dow Chemical Co.*, 413 S.W.2d 332, 333 (Ky. 1967).

To ascertain whether a reasonable period of time has passed, we evaluate whether the lack of the appointment of an expert witness is based on a failure of proof or an inability to meet a deadline. Further, what constitutes a reasonable amount of time depends upon the complexities of the case and other factors. There is no hard-and-fast rule. Our review consists of careful examination of the relevant circumstances of each case. If a reasonable amount of time expires and the party has still failed to file any expert disclosures or request an extension of time, the trial court has the discretion to deny a motion for an extension of time and to grant summary judgment. *Neal v. Welker*, 426 S.W.2d 476, 479-480 (Ky. 1968).

Here, Miller had sufficient time to appoint an expert but did not do so. In a case where the trial court provided clear timelines for the litigation, Paintsville Hospital moved for summary judgment approximately a year after the medical

malpractice action was filed and seven months after Dr. Brackett was identified as Miller's medical expert. Without explanation for its failure to provide an expert, Miller's primary response to the summary judgment was a motion for additional time to seek a medical expert.

Now, Miller's sole basis for the appeal is that the trial court abused its discretion in denying her additional time to find another medical expert. However, she never suggests that Paintsville Hospital delayed or obstructed the case. And she never explains the failure to obtain an expert. Hence, we conclude that the trial court did not abuse its discretion in denying the motion for an extension of time. Under this particular fact pattern, Miller had sufficient time to provide an expert or make a motion for an extension of time much earlier. She did neither. Since no expert witness provided testimony purporting to support a deviation from the standard of care or causation of Miller's injuries, the grant of summary judgment was proper, too.

CONCLUSION

Having carefully reviewed the record, we conclude that the trial court did not abuse its discretion in denying Miller's motion for an extension of time. Furthermore, it properly granted Paintsville Hospital's summary judgment motion. The decision of the Johnson Circuit Court is affirmed.

ALL CONCUR.

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