Rel: March 18, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200554

Joseph McLain

v.

William J. Bose, M.D., and Advanced Orthopaedics, LLC

Appeal from Baldwin Circuit Court
(CV-20-900135)

PER CURIAM.

AFFIRMED. NO OPINION.

Parker, C.J., and Bolin, Shaw, Bryan, Mendheim, and Mitchell, JJ., concur.

Wise, J., concurs specially.

Sellers and Stewart, JJ., dissent.

WISE, Justice (concurring specially).

Although I understand the unique posture of the proceedings below, I write specially to point out that the record before this Court does not indicate that Joseph McLain, the plaintiff, timely and properly preserved for appellate review the argument the dissent addresses. Therefore, it would be inappropriate for this Court to address the merits of that argument.

On November 19, 2020, the Baldwin Circuit Court granted the parties' joint motion to continue the hearing on the motion for a summary judgment filed by the defendants, William J. Bose, M.D., and Advanced Orthopaedics, LLC. It rescheduled the hearing to February 23, 2021, at 9:15 a.m. On January 8, 2021, the trial court sent the parties notice that the hearing was scheduled for February 23, 2021, at 9:15 a.m. On February 10, 2021, at 11:16 a.m. and 11:19 a.m., the trial court's senior judicial assistant sent e-mails to the parties reminding them that the hearing on the motion for a summary judgment was scheduled to be heard on February 23, 2021, at 9:15 a.m.

On February 23, 2021, at 6:58 a.m., McLain's counsel sent an e-mail

to the trial court's senior judicial assistant, stating:

> "I will plan on being online at the start of the hearing. The hearing was re-set on defendant's [motion for a summary judgment].
>
> "The parties previously filed a joint motion to continue because Plaintiff has been given until June 1, 2021 to disclose an expert under the scheduling order. The [motion for a summary judgment] hearing is premature until after that date.
>
> "I'm sorry to be late pointing this out. I am recovering from COVID and am recently out of quarantine.
>
> "I will see y'all online unless the Court moves the hearing before 9:15."

The trial court sent at least four notices during the three-month period between granting the parties' joint motion to continue and the date of the rescheduled hearing that the hearing on the defendants' motion for a summary judgment had been reset for February 23, 2021. Nevertheless, McLain did not file anything with the trial court during that three-month period. He did not file an objection on the basis that the trial court had set the hearing before the date that had been set in the scheduling order for designating his expert witnesses; a request for a continuance, pursuant to Rule 56(f), Ala. R. Civ. P., to permit affidavits to be obtained or

depositions to be taken; or any other response opposing the defendants' motion for a summary judgment. At most, McLain merely mentioned the June 1, 2021, deadline for designating his expert witnesses and the alleged prematurity of the hearing on the motion for a summary judgment only in an e-mail his attorney sent to the trial court's senior judicial assistant approximately two hours before the hearing was scheduled to start. Therefore, before the hearing, he did not timely present any objection or argument to the trial court about holding a hearing on the motion for a summary judgment before the June 1, 2021, deadline.

McLain alleges that he opposed the motion for a summary judgment during the hearing on the ground that it was premature. However, he did not include a transcript of that hearing in the record on appeal or a statement of the evidence or proceedings pursuant to Rule 10(d), Ala. R. App. P.

> " 'The law is settled that it is the appellant's duty to ensure that the appellate court has a record from which it can conduct a review. Cooper & Co. [v. Lester, 832 So. 2d 628 (Ala. 2000)]; [Alfa Mut. Gen. Ins. Co. v.] Oglesby, [711 So. 2d 938 (Ala. 1997)]; and Gotlieb v. Collat, 567 So. 2d 1302 (Ala. 1990). Further, in the absence of evidence in the

> record, this Court will not assume error on the part of the trial court. Browning v. Carpenter, 596 So. 2d 906 (Ala. 1992); Smith v. Smith, 596 So. 2d 1 (Ala. 1992); Totten v. Lighting & Supply, Inc., 507 So. 2d 502 (Ala. 1987).'
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> "Zaden v. Elkus, 881 So. 2d 993, 1009 (Ala. 2003). Williams (the appellant in this cross-appeal) had the burden of ensuring that the record on appeal contains sufficient evidence to warrant a reversal of the judgment he challenges. Gotlieb v. Collat, 567 So. 2d 1302 (Ala. 1990). The law in Alabama is settled that when the record is silent as to evidence considered by the trial court, we must presume that the evidence considered was sufficient to support the trial court's judgment. Browning v. Carpenter, 596 So. 2d 906 (Ala. 1992); Smith v. Smith, 596 So. 2d 1 (Ala. 1992); and Totten v. Lighting & Supply, Inc., 507 So. 2d 502 (Ala. 1987)."

Parker v. Williams, 977 So. 2d 476, 481-82 (Ala. 2007). Therefore, there is not anything in the record that is before us to support McLain's assertion that he raised this argument during the hearing on the motion for a summary judgment. Instead, based on the record that is before us, it appears that McLain first presented this argument in his motion to alter, amend, or vacate the summary judgment that the trial court entered in favor of the defendants. This Court addressed a similar situation in Espinoza v. Rudolph, 46 So. 3d 403, 415-16 (Ala. 2010), and explained:

> "Jabez argues that the redemption was invalid because Rudolph did not make a written demand for a statement of the value of improvements, and the parties did not resolve their dispute over moneys allegedly due Jabez for improvements according to the process required in § 40-10-122(d)[, Ala. Code 1975]. Not until his postjudgment motion did Jabez argue that the redemption was invalid because Rudolph had not submitted a written request for an itemization of Jabez's expenses or because she had otherwise failed to comply with the requirements of § 40-10-122(d). ' "[A] trial court has the discretion to consider a new legal argument in a post-judgment motion, but is not required to do so." ' Special Assets, L.L.C. v. Chase Home Fin., L.L.C., 991 So. 2d 668, 678 (Ala. 2007) (quoting Green Tree Acceptance, Inc. v. Blalock, 525 So. 2d 1366, 1369 (Ala. 1988)). There is no indication that the trial court considered the merits of the legal argument raised for the first time in Jabez's postjudgment motion, and we will not presume that it did. See Special Assets, 991 So. 2d at 678. Jabez offers no justification for the delayed presentation of his argument. The trial court did not exceed its discretion in refusing to grant Jabez's postjudgment motion on the basis of Rudolph's failure to request an itemization of expenses Jabez incurred to improve the property. See Green Tree Acceptance, Inc. v. Blalock, 525 So. 2d 1366, 1370 (Ala. 1988) ('Based on the record before this Court on appeal, we conclude that there was no justification given by Green Tree for failing to raise the argument prior to its post-judgment motion.')."

Likewise, in this case, there is not any indication that the trial court considered arguments that were raised for the first time in McLain's motion to alter, amend, or vacate, and McLain has not offered any

justification for not raising those arguments before the hearing on the motion for a summary judgment.

For these reasons, it does not appear from the record before this Court that the argument the dissent addresses was properly and timely presented to the trial court. Accordingly, McLain's argument in this regard is not properly before this Court, and the trial court's judgment is due to be affirmed.

SELLERS, Justice (dissenting).

Joseph McLain sued William J. Bose, M.D., and Advanced Orthopaedics, LLC, Dr. Bose's employer, alleging medical malpractice. According to McLain, Dr. Bose damaged McLain's knee while performing surgery.

> "To maintain a medical-malpractice action, the plaintiff ordinarily must present expert testimony from a 'similarly situated health-care provider' as to (1) 'the appropriate standard of care,' (2) a 'deviation from that standard [of care],' and (3) 'a proximate causal connection between the [defendant's] act or omission constituting the breach and the injury sustained by the plaintiff.' Pruitt v. Zeiger, 590 So. 2d 236, 238 (Ala. 1991) (quoting Bradford v. McGee, 534 So. 2d 1076, 1079 (Ala. 1988)). The reason for the rule that proximate causation must be established through expert testimony is that the issue of causation in a medical-malpractice case is ordinarily 'beyond "the ken of the average layman." ' Golden v. Stein, 670 So. 2d 904, 907 (Ala. 1995), quoting Charles W. Gamble, McElroy's Alabama Evidence, § 127.01(5)(c), p. 333 (4th ed. 1991). The plaintiff must prove through expert testimony 'that the alleged negligence "probably caused the injury." ' McAfee v. Baptist Med. Ctr., 641 So. 2d 265, 267 (Ala. 1994)."

Lyons v. Walker Reg'l Med. Ctr., 791 So. 2d 937, 942 (Ala. 2000). It is well established that expert testimony is crucial in a medical-malpractice

action. Shadrick v. Grana, 279 So. 3d 553, 556 (Ala. 2018); HealthSouth Rehab. Hosp. of Gadsden, LLC v. Honts, 276 So. 3d 185, 198 (Ala. 2018).

McLain filed his complaint in January 2020. Based on a joint request by the parties, the trial court entered a scheduling order giving McLain until June 1, 2021, to designate any expert witnesses, giving the defendants until September 1, 2021, to depose those experts, and giving McLain until November 1, 2021, to depose the defendants' experts. Deadlines in scheduling orders "shall not be modified except by leave of court upon a showing of good cause." Rule 16(b), Ala. R. Civ. P. Pretrial orders entered after scheduling conferences "shall control the subsequent course of the action unless modified by a subsequent order." Rule 16(e), Ala. R. Civ. P. In November 2020, before the expiration of the referenced deadlines, the defendants filed a motion for a summary judgment, asserting that McLain could not present substantial evidence in the form of expert testimony indicating that Dr. Bose had breached the applicable standard of care.

The trial court entered an order setting the summary-judgment motion for a hearing on December 1, 2020. The parties, realizing that the

hearing date was premature based on the expert-witness deadlines set out in the scheduling order, filed a joint motion to continue the hearing. In their motion, the parties specifically pointed out that McLain had an additional six months in which to designate his expert witnesses. Nevertheless, the trial court inexplicably reset the hearing for February 2021, a little more than three months before expiration of McLain's expert-disclosure deadline.

On the morning of the rescheduled hearing, McLain's counsel sent an e-mail to the trial court's judicial assistant pointing out that the trial court had again prematurely set the hearing on the summary-judgment motion. The trial court, however, went forward with the hearing and, thereafter, entered a summary judgment in favor of the defendants, presumably based on McLain's failure to present evidence indicating that Dr. Bose had breached the standard of care. McLain appealed.[1]

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[1]The trial court's judgment states that "[n]o response having been filed by the plaintiff, defendants' motion for summary judgment ... is hereby granted." But the failure to file a response to a summary-judgment motion is not, by itself, a ground for granting the motion. Ex parte Oden, 617 So. 2d 1020, 1028 (Ala. 1992) Accordingly, I assume the trial court concluded that McLain had failed to present substantial

Dr. Bose is board certified in orthopaedic surgery. Thus, pursuant to § 6-5-548(c), Ala. Code 1975, McLain was required to present expert testimony by a surgeon "licensed by the appropriate regulatory board or agency of this or some other state," who is "trained and experienced in the same specialty" as Dr. Bose, and who is "certified by an appropriate American board in [that] specialty" and has "practiced in [that] specialty during the year preceding the date that the alleged breach of the standard of care occurred." Finding the right expert requires time, and the trial court gave McLain until June 1, 2021, to do so. In conflict with that deadline, the trial court granted the defendants' summary-judgment motion more than three months before the deadline expired.

McLain's failure to file a response to the summary-judgment motion was not, by itself, sufficient to justify entering a summary judgment. Ex parte City of Montgomery, 758 So. 2d 565, 569 (Ala. 1999) ("Rule 56(e)[, Ala. R. Civ. P.,] does not provide that the nonmoving party will be in default for failing to respond to a summary-judgment motion. A trial court

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evidence in support of his assertion that Dr. Bose had breached the standard of care.

should grant a motion for summary judgment only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law."), abrogated on other grounds by Ex parte Cranman, 792 So. 2d 392 (Ala. 2000). The defendants bore the initial burden of establishing that McLain did not have sufficient evidence to support his claims and that there was no genuine issue of material fact for trial. Pritchett v. ICN Med. All., Inc., 938 So. 2d 933, 935 (Ala. 2006). In attempting to meet their burden, the defendants averred that McLain had not submitted the necessary expert testimony. But, because McLain had several more months in which to designate an expert, the defendants' averment was simply irrelevant. Thus, the defendants did not establish that they were entitled to a judgment as a matter of law based on a lack of evidence supporting McLain's claims. I would therefore reverse the trial court's summary judgment.

Stewart, J., concurs.