

DIVISION III

ROBERT J. GLADWIN, Judge
ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

CA05-926

NOVEMBER 8, 2006

WILMA LEE, Administratrix of the Estate
of Indianna Barnes, Deceased
APPELLANT

APPEAL FROM THE SALINE COUNTY
CIRCUIT COURT
[NO. CV2004-334-2, CIV01-384-2]

HON. GRISHAM PHILLIPS,
JUDGE

V.

QUORUM HEALTH RESOURCES, LLC
and/or Quorum Health Services, Inc.
APPELLEE

REVERSED AND REMANDED

This appeal is brought from a summary judgment entered in favor of appellee Quorum Health Resources, LLC (sometimes referred to by the parties as Quorum Health Services, Inc.). Appellant argues, inter alia, that summary judgment was premature due to outstanding discovery. We agree and reverse and remand.

Appellant Wilma Lee is the personal representative of the late Indianna Barnes. Ms. Barnes was admitted to Saline Memorial Hospital in January 2000, suffering from respiratory problems. A nasogastric feeding tube was used to provide nourishment. At some point during her stay, Ms. Barnes's feeding tube became occluded and was replaced by the nursing staff. An x-ray was ordered to confirm correct placement, and it revealed that the tube improperly

extended into Ms. Barnes's lung. The tube was either replaced or repositioned, and another x-ray was ordered. However, feeding resumed for several hours while awaiting the x-ray results. When the second x-ray was read the next morning, the radiologist, Dr. Gordon Schally, observed that the tube still extended into Ms. Barnes's lung. Dr. Schally notified Ms. Barnes's attending physician, Dr. Mark Martindale, who came to the hospital and consulted with a surgeon regarding the situation. Unfortunately, Ms. Barnes became unstable and died later that day.

Thereafter, appellant was appointed administratrix of Ms. Barnes's estate. She settled with Saline Memorial Hospital, then filed suit against several defendants, including Dr. Martindale, Dr. Schally, and appellee Quorum, which, she contended, was the management company of Saline Memorial Hospital. She alleged that the defendants were negligent in various respects, including failing to have a properly trained staff on hand to ascertain the nature of Ms. Barnes's condition; failing to coordinate the communication of information to those treating her; and failing to hire and/or supervise competent physicians, nurses, and other healthcare personnel.

Quorum answered and pled that appellant's settlement with Saline Memorial Hospital inured to its benefit. The parties then engaged in discovery, with appellant propounding several interrogatories and requests for production to Quorum seeking to ascertain the nature

of its relationship with Saline Memorial.¹ Quorum responded, for the most part, by stating that the information would be provided later. Quorum, in its discovery, asked appellant to state each and every act or omission by Quorum that she alleged constituted negligence. Appellant responded, in pertinent part, that Quorum was one of the largest providers of hospital-management services in the country and had provided management services to Saline Memorial in 2000; that Quorum typically placed an employee as CEO or chief administrator of a hospital; that it generally has the authority to control hospital staffing and in some circumstances hires and trains workers to oversee quality control; that it had the right to control “staffing adequacy, quality controls, and lines of communication” at Saline Memorial Hospital; that inadequate staffing, training, supervisory controls, quality controls, and communication, “for which a Quorum employee shared responsibility,” contributed to a failure on the part of the nursing staff to adhere to proper medical treatment when they resumed feeding of Ms. Barnes; and that the same negligence contributed to the failure to have Ms. Barnes’s x-ray read for a long period of time while the feeding continued.

On February 20, 2002, Quorum filed a motion for summary judgment, arguing that appellant’s complaint and interrogatory response clearly showed that her case against Quorum was one of vicarious liability for the acts of the hospital and its employees and,

¹ For example, appellant asked to be provided with contracts delineating the respective duties of Saline Memorial and Quorum, policy and procedure manuals used by Saline Memorial or Quorum, and any working agreements between Saline Memorial and Quorum.

therefore, the release in favor of the hospital also released Quorum. The motion came on for hearing on March 10, 2003, at which time appellant non-suited her claim against Quorum.²

Appellant re-filed her complaint against Quorum and the other defendants on April 1, 2004. The complaint was the same in all pertinent respects as her first complaint and a previously-filed amended complaint, which had added a claim that Ms. Barnes was a third-party beneficiary of the contract between Saline Memorial and Quorum. Quorum filed a motion for summary judgment on the same ground previously stated. Appellant responded that her claim against Quorum was not strictly one of vicarious liability but of independent, negligent acts committed by Quorum. Appellant also stated that she had previously requested (through discovery in the first lawsuit) relevant documents concerning the nature of the contractual relationship between Saline Memorial and Quorum. However, she said, Quorum had failed to answer that discovery, so she was submitting another set of interrogatories. Those interrogatories sought information about Quorum's relationship with Saline Memorial, including a copy of their contract. Appellant asked that Quorum's motion for summary judgment be denied or held in abeyance until completion of discovery.

On the date that Quorum's discovery responses were due, it asked for an extension of time to respond. Appellant did not object but once again asked the court not to rule on Quorum's motion for summary judgment until she received Quorum's responses. Quorum

² Appellant's case against all remaining defendants was dismissed on January 14, 2004, for want of prosecution.

filed a second motion for an extension on or about the next due date, asserting that any responses it might give were not “germane” to the issues and, in effect, asking the court to rule on its motion for summary judgment prior to discovery responses being required. Appellant objected, asked that Quorum be ordered to respond to discovery immediately, and reiterated that Quorum’s motion for summary judgment should not be ruled upon until responses were received. Nevertheless, within thirty days, the trial court granted summary judgment to Quorum. Appellant obtained an Ark. R. Civ. P. 54(b) certificate, allowing her to appeal even though her claim against the other defendants had not yet been resolved. She now argues that the trial court erred in granting summary judgment because: 1) the settlement agreement with Saline Memorial did not release Quorum; 2) discovery was not yet completed; 3) she is entitled to recover on her third-party beneficiary claim. Because we agree with appellant that summary judgment was premature in light of outstanding discovery, we reverse and remand on that issue without addressing the remaining points.

We review the trial court’s action in this case for an abuse of discretion. *See Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995). Our supreme court has held that, “before being required to fully demonstrate . . . evidence in response to a motion for summary judgment a plaintiff is entitled to have the benefit of adequate discovery from the opposing party as the nature of the case requires.” *First Nat’l Bank v. Newport Hosp. & Clinic*, 281 Ark. 332, 335, 663 S.W.2d 742, 743-44 (1984); *see also Pledger v. Carrick*, 362 Ark. 182, ___ S.W.3d ___ (May 5, 2005) (holding that summary judgment was premature

where, due to lack of discovery, the facts of the case were not sufficiently developed for the circuit court to determine whether summary judgment was appropriate). Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending action, including the claims or defenses of the parties. Ark. R. Civ. P. 26(b)(1) (2006).

In the present case, appellant's interrogatories and requests for production sought contracts and other information about the duties and services Quorum provided to Saline Memorial. These requests were relevant and in fact necessary for appellant to respond to Quorum's defense that its relationship with Saline Memorial gave it the benefit of Saline Memorial's settlement with appellant. Given these facts, we conclude that the trial court abused its discretion in granting summary judgment prior to appellant's receiving responses to her discovery requests.

Quorum argues that appellant was lax in pursuing discovery. It is true that, in determining issues such as the one before us, our courts have considered whether the appellants were diligent in their discovery efforts. *See Flake, supra*; *see also Jenkins v. Int'l Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994); *Crawford v. Lee County Sch. Dist.*, 64 Ark. App. 90, 983 S.W.2d 141 (1998). However, Quorum's argument is not well taken under the circumstances of this case. In the first lawsuit, Quorum responded to appellant's requests to the pertinent discovery by stating that the information had been requested and would be provided upon receipt. The information was never provided, and while appellant certainly

could have filed a motion to compel, Quorum could likewise have provided the information or interposed an objection.

In 2003, appellant took a non-suit as it was her absolute right to do. *See Shaw v. Destiny Indus., Inc.*, 78 Ark. App. 8, 76 S.W.3d 905 (2002). Her complaint was re-filed in April 2004, and Quorum moved for summary judgment in August 2004. In September 2004, appellant propounded additional discovery to Quorum and repeatedly asked that summary judgment be postponed until the discovery was answered. Quorum did not object to appellant's lack of diligence but filed two extensions of time to respond, ultimately stating that it did not consider appellant's discovery requests to be germane to the issues. In light of these circumstances, we cannot say that summary judgment should have been entered due to appellant's lack of diligence (and there is no indication that this was the basis for the trial court's ruling).

Quorum also points to the fact that appellant did not submit an affidavit to the trial court pursuant to Ark. R. Civ. P. 56(f), stating why she could not present facts in opposition to Quorum's motion. In *Crawford, supra*, discussing the plaintiff's lack of diligence in pursuing discovery, we noted that, had the plaintiff filed a Rule 56(f) affidavit, "the trial court might well have postponed a decision on summary judgment." *Crawford*, 64 Ark. App. at 95, 983 S.W.2d at 144. However, we do not see that a Rule 56(f) affidavit would have made a difference in the present case, given that appellant constantly reminded the court that she was awaiting discovery responses and urged that summary judgment not be granted until

she received them. Such action by appellant also distinguishes this situation from that in *Jenkins, supra*, where the trial court entered summary judgment after giving the plaintiffs nine additional months after the scheduled summary-judgment hearing to submit opposing affidavits, during which they neither pursued discovery nor moved for additional time in which to do so.

Based on the foregoing, we reverse and remand for further proceedings.

Reversed and remanded.

BIRD and ROAF, JJ., agree.