RENDERED: APRIL 25, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000520-MR

DONNA K. DECKER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 00-CI-002507

KIMBERLY A. ALUMBAUGH, M.D. — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. In this medical malpractice action, Donna K. Decker (hereinafter "Decker") has appealed from the Jefferson Circuit Court's February 8, 2002, summary judgment in favor of Kimberly A. Alumbaugh, M.D., (hereinafter Dr. Alumbaugh). Having considered the parties' briefs, the certified record and the applicable case law, we affirm.

On April 13, 2000, Decker filed a complaint in the Jefferson Circuit Court alleging that Dr. Alumbaugh negligently performed a surgical procedure on her on April 28, 1999, causing a punctured bowel necessitating further surgical repair, and that she deviated from the standard of care of a reasonably competent medical doctor acting under the same or similar circumstances. She alleged that as a direct and proximate cause of this negligence, she suffered severe physical pain, mental anguish and distress, lost wages[1], and incurred hospital and medical expenses for the care and treatment of her injuries. Dr. Alumbaugh filed a response on April 26, 2000, stating that the complaint failed to state a cause of action upon which relief could be granted and praying that the complaint be dismissed.

Soon thereafter, Dr. Alumbaugh served Decker with several discovery requests, including a Request for Admissions, a First Set of Request for Production of Documents, and a First Set of Interrogatories[2]. Although Decker filed her response to the Request for Admissions on May 3, 2000, she did not file the other two responses within thirty days. The response she did file did not name an expert witness upon whom she planned to

[1] Decker apparently dropped her claim for lost wages because in discovery responses, she indicated that she was unemployed both at the time of the incident and at the time she completed the discovery response. Therefore, she did not have any lost wages to claim.
[2] This particular discovery request was apparently served on April 25, 2000.

rely. Accordingly, Dr. Alumbaugh filed a motion for summary judgment pursuant to CR 56.03 on May 25, 2000, relying upon her own affidavit stating that she met the standard of care in her treatment of Decker, and that the bowel injury, a recognized complication, occurred in the absence of negligence. In her motion, Dr. Alumbaugh argued that she was entitled to a judgment as a matter of law because Decker failed to state an issue of material fact against her and did not provide the name of an expert witness to support her claim of negligence. Therefore, Decker would be unable to dispute Dr. Alumbaugh's affidavit concerning her treatment.

On June 11 and June 13, 2000, Decker filed her responses to the remaining discovery requests, in which she named Dr. Lawrence W. Nunemaker, a gynecologist, as her retained expert witness. She also indicated that she could not provide Dr. Alumbaugh with any of her medical records as they were in the possession of Dr. Nunemaker. She then filed a response to the motion for summary judgment on June 14, 2000, in which she stated that she had not yet received Dr. Nunemaker's report, but expected to receive it within the next ten days. However, she stated in her response that Dr. Nunemaker indicated to her counsel that Dr. Alumbaugh was negligent. Dr. Alumbaugh scheduled the deposition of Dr. Nunemaker for June 23, 2000, and served a *subpoena duces tecum* on Dr. Nunemaker for Decker's

medical records on June 15, 2000. The deposition was apparently renoticed for March 1, 2001, but canceled due to the circuit court's entry of a summary judgment.

To the apparent surprise of the parties, the circuit court granted Dr. Alumbaugh's motion for summary judgment by order entered February 20, 2001, basing its decision upon Decker's failure to state an issue of material fact against Dr. Alumbaugh and the fact that she did not have an expert to support her claim. This order was vacated by the circuit court on Decker's motion on April 30, 2001. In October, Dr. Alumbaugh once again noticed the deposition of Dr. Nunemaker as well as of Decker for December 5, 2001, and served another *subpoena duces tecum* on Dr. Nunemaker, who had not responded to the first s*ubpoena*. The depositions were canceled, however, due to a family emergency concerning Decker's counsel, and Dr. Nunemaker apparently never responded to the second *subpoena*.

On December 11, 2001, Dr. Alumbaugh filed a renewed motion for summary judgment, indicating that Decker had still not produced her expert witness, Dr. Nunemaker, for a deposition or provided an affidavit from him to support her claim, despite repeated requests. Decker did not file a response to the motion for summary judgment within twenty days pursuant to the local rules. Therefore, the circuit court entered an order on January 17, 2002, indicating that it had taken the matter under

submission as the time for filing a response had passed. Not until February 4, 2002, did Decker file a late response to the renewed motion for summary judgment, in which she stated that she still had not received a written report from Dr. Nunemaker and therefore could not produce it for Dr. Alumbaugh, and that Dr. Alumbaugh had not attempted to reschedule the canceled depositions. Furthermore, she argued that the grounds of Dr. Alumbaugh's renewed motion were in the nature of a discovery dispute, and that summary judgment should not be used as a sanctioning tool in such situations. By order signed on January 30, 2002, but not entered until February 8, 2002, the circuit court granted Dr. Alumbaugh's renewed motion for summary judgment and dismissed the action with prejudice, noting that Decker's response was due on January 6, 2002. This appeal followed.

In her brief, Decker continues to argue that the circuit court abused its discretion by using summary judgment as a dismissal tool for what she avers is a discovery dispute. She notes that the discovery delay had not been of a long duration, and that existing material facts still needed to be litigated. On the other hand, Dr. Alumbaugh counters Decker's contentions and argues that the procedural history of the action and the lack of evidence in the record support the summary judgment. Dr. Alumbaugh first argues that Decker failed to preserve the

issue raised on appeal because she did not take any timely action after the filing of the renewed motion for summary judgment. Furthermore, Dr. Alumbaugh argues that Decker had failed to produce any evidence from her expert witness, over a year from the date her counsel assured the circuit court and opposing counsel that a report would be forthcoming.

In Lewis v. B&R Corporation, Ky.App., 56 S.W.3d 432, 436 (2001), this Court set out the standard of review in appeals from summary judgments:

> The standard of review on appeal when a trial court grants a motion for 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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in Steelvest [Ky., 807 S.W.2d 476 (1991)]used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal

> questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. (citations in footnotes omitted)

Additionally, the Supreme Court in Hoke v. Cullinan, Ky., 914 S.W.2d 335, 337 (1996), stated that "[p]rovided litigants are given an opportunity to present evidence which reveals the existence of disputed material facts, and upon the trial court's determination that there are no such disputed facts, summary judgment is appropriate." With this standard of review in mind, we shall consider the matter before us.

Pursuant to CR 56.03, a summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulation, 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 a judgment as a matter of law." Here, we agree with Dr. Alumbaugh that, based upon the history of this case and the evidence provided, there is no genuine issue as to any material fact, and that she is entitled to a judgment as a matter of law.

In our review of the record, we note that Decker's first mention of Dr. Nunemaker as her retained expert witness came in her June 11, 2000, answer to the Request for Production of Documents, followed closely by her naming of Dr. Nunemaker as a witness at trial in her answer to Interrogatories. In her

June 14, 2000, response to the original motion for summary judgment, she indicated that she expected to receive Dr. Nunemaker's report within ten days. By the time Dr. Alumbaugh renewed her motion for summary judgment in December 2001, neither party had received a copy of any type of report from Dr. Nunemaker, despite Decker's assurances that the report was forthcoming months previously. We further note that at no time did Decker attempt to name a new expert witness to support her claim of negligence. She is therefore left with nothing to counter Dr. Alumbaugh's affidavit in which she stated she met the applicable standard of care in her treatment of Decker.

In order to go forward with her case, Decker must present expert testimony to support her claim of negligence. In Jarboe v. Harting, Ky., 397 S.W.2d 775 (1965), the former Court of Appeals of Kentucky set out the general rule as follows: "[T]he general rule is that expert testimony is required in a malpractice case to show that the defendant failed to conform to the required standard." Id. at 778. The only evidence presented in this case is the affidavit of Dr. Alumbaugh, in which she states that her actions were not negligent. Decker was provided with a more than adequate amount of time to provide Dr. Nunemaker's report supporting her claim, but failed to do so or to offer any other type of proof. Therefore, there is no

issue of material fact to be decided by a fact-finding jury, and Dr. Alumbaugh is entitled to a judgment as a matter of law.

We disagree with Decker's contention that this is a discovery dispute matter of short duration, and that summary judgment should not have been used as a sanctioning tool in this instance. Decker's first discovery response was filed in May 2000, followed by assurances that Dr. Nunemaker's report establishing negligence would be shortly forthcoming. By the time the circuit court granted the renewed motion for summary judgment in early 2002, the report had not been received by either party. Likewise, the certified record does not reveal that Dr. Nunemaker's report was ever filed or made available to Dr. Alumbaugh, and Decker did not aver in her brief that she ever received it. This "delay" cannot be considered to be of short duration as argued by Decker, especially in light of the fact that she did not apparently retain any other expert witness to provide evidence on her behalf.

We have reviewed the cases relied upon by Decker to the effect that summary judgment is not to be used as a sanctioning tool in discovery disputes, but do not find those cases to be applicable here. In Ward v. Houseman, Ky.App., 809 S.W.2d 717 (1991), a dismissal by summary judgment was reversed in a case where plaintiff's counsel failed to timely provide the name of an expert witness several months prior to trial. The

defendant merely moved to exclude the expert's testimony, not for a summary judgment. Likewise, in Bridewell v. City of Dayton, Ky.App., 763 S.W.2d 151 (1988), the Court of Appeals held that the circuit court's dismissal of an action when interrogatories were filed four weeks late was an abuse of discretion. In the present case, Decker had at least one and one-half years to produce a report or affidavit from Dr. Nunemaker, or to produce him for a deposition, but failed to do so. Furthermore, we do not believe that the circuit court used summary judgment to sanction Decker, as it based its decision on the lack of an expert witness and failure to state an issue of material fact against Dr. Alumbaugh.

Because we agree with the circuit court that there are no genuine issues as to any material fact and that Dr. Alumbaugh is entitled to a judgment as a matter of law, we affirm the circuit court's summary judgment dismissing the complaint.

ALL CONCUR.

BRIEF FOR APPELLANT:

G. William Bailey, Jr.
Elizabethtown, KY

BRIEF FOR APPELLEE:

Scott P. Whonsetler
Louisville, KY

Kirsten Rene Daniel
Louisville, KY