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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000312-MR

LINDA S. WILBOURN and
JOE S. WILBOURN — APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
CIVIL ACTION NO. 99-CI-00637

TIMOTHY E. SHIBEN, M.D., and
BLUEGRASS GASTROENTEROLOGY — APPELLEES

AND NO. 2002-CA-000942-MR

LINDA S. WILBOURN and
JOE S. WILBOURN — APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
CIVIL ACTION NO. 99-CI-00637

DAVID MEYER, M.D., d/b/a PADUCAH
PSYCHIATRIC GROUP — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: Linda S. Wilbourn and Joe S. Wilbourn appeal from a McCracken Circuit Court order dismissing their complaint alleging medical negligence against Timothy E. Shiben, M.D., and Bluegrass Gastroenterology, P.S.C. and granting summary judgment in favor of Shiben and Bluegrass. The Wilbourns also appeal from the court's subsequent order dismissing their complaint as to David A. Meyer, M.D., d/b/a Paducah Psychiatric Group, and granting summary judgment in favor of Meyer.[1] Because the same issue is dispositive in both cases, the appeals will be consolidated for the purpose of review.

In November 1997, Linda began suffering from nausea and vomiting on a regular basis for no apparent reason. Although she underwent surgery to have her gallbladder removed, the problems persisted. After consulting several physicians,

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[1] In their complaint, the Wilbourns also named R. Eric Shields, M.D., and Lourdes Hospital, d/b/a Lourdes Hospital, Inc., as parties. However, in an order entered on April 20, 2001, the court granted summary judgment in favor of Lourdes Hospital and the Wilbourns have not appealed from that judgment. As the Wilbourns have apparently settled their claim against Shields, Shiben and Meyer are the only remaining parties.

Linda was referred to Shiben, a board-certified gastronenterologist, for specialized treatment. Shiben began treating Linda on May 7, 1998, and immediately scheduled a number of tests for the purpose of determining the cause(s) of her symptoms. With the exception of a positive test for gastritis, however, all of the results were normal. Consequently, Linda was hospitalized from June 8th through June 11th for further diagnostic testing, during which time Shiben requested a psychiatric consultation from Meyers in order "to confirm his suspicion that to some extent [Linda's] problems had psychological origins."[2] At that time, Shiben considered a brain tumor to be a potential but "extremely unlikely" cause for her symptoms. Nonetheless, he ordered a CT scan of the head on June 11, 1998, which the radiologist, Shields, read as normal.

On June 21, 1998, Linda presented to the emergency room complaining of an inability to hold down any liquids and was admitted for IV hydration. In the "history and physical" prepared by Shiben upon her admission, Shiben indicated that

[2] As observed by Shiben, the Wilbourns apparently failed to certify Meyer's consultation report as part of the record below. Although Shiben attempted to cure this deficiency by including the report as an exhibit to his brief, his contemporaneous motion to modify the record on appeal was denied. Thus, we are precluded from considering this document thereby dispensing with the need to address the Wilbourns' contention that Shiben either misread Meyer's note or Meyer was negligent in writing the note since he "never meant to say that depression had any role in [Linda's] problems." See Ky. R. Evid. (KRE) 901(a) and (b).

Linda was suffering from "intractable nausea and vomiting" but the "extensive workup" as described had been "unremarkable." Shiben further acknowledged that he had been unable to find a cause "other than major depression" to account for her illness and, therefore, strongly recommended that she continue taking Zoloft as prescribed and follow up with Mental Health upon being discharged. Although he also offered intervention with a feeding tube and/or a referral to the University of Kentucky Medical Center, Linda declined both.

While in the hospital, Linda underwent an abdominal obstructive series and an enteroclysis was attempted but not completed as documented by the discharge summary. However, the "[t]here was no evidence on the plain films of abdominal obstruction."[3] According to Shiben, Meyer had confirmed his diagnosis of major depression during her last admission and, although Linda had followed his recommendation as to Mental Health, she left upon learning that she would have to be there all day. Shiben informed Linda that "there was a chance that she could possibly die from this illness" if her symptoms

[3] Shiben also observed that Linda had a history of "a small bowel follow through with barium reaching the colon and then a colonoscopy with terminal ileum intubation which was normal." Absent a change in her abdominal x-rays, Shiben saw no need to repeat the enteroclysis. Further, he commented that she had a "known lesion in her left ischium of her pelvis" that was believed to benign. Linda had also undergone a bone scan which was also unremarkable.

persisted" although he did believe that her condition was treatable with medications and mental health treatment on an outpatient basis. Linda again declined Shiben's offer to transfer her to UK for a second opinion and insert a feeding tube to assist with nutrition.

In early July 1998, Linda developed further symptoms that she concedes differed from those she had been experiencing while under the care of Shiben. She sought treatment at Vanderbilt University Medical Center where her treating neurologist, Dr. Moots, ordered an MRI that revealed a brain tumor called a medullablastoma that was surgically removed.[4] Both Dr. Toms, Linda's surgeon, and Moots subsequently reviewed the CT scan ordered by Shiben and read by Shields and have since testified that the brain tumor Shields failed to detect is clearly visible on the scan. Shields conceded as much in his own deposition.

In a complaint filed on July 6, 1999, the Wilbourns alleged that a physician-patient relationship was established between Linda and Shiben "on and perhaps prior to May 7, 1998," which continued until July 6, 1998. According to the Wilbourns, he "failed to properly inform, diagnose and treat [Linda] by acts of omission and commission, resulting in the failure to

[4] According to Shiben, this is "a very serious and usually devastating form of brain cancer."

timely diagnose and treat her malignant tumor" and, further, that "the diagnoses, treatment and information rendered by [Shiben] were negligently rendered and deviated from acceptable medical and gastroenterologic standards."

Similarly, the Wilbourns alleged that a physician-patient relationship had been established between Linda and Meyer on June 10, 1998, that continued until July 6, 1998, and that he was negligent in failing to "properly inform, diagnose and treat [Linda] by acts of omission and commission." In their view, the "diagnoses, treatment and information rendered by [Meyer]" was also "negligently rendered and deviated from acceptable medical and psychiatric standards."

Meyer and Shiben filed their answers on July 22nd and July 23rd, respectively. Later that month, both Meyer and Shiben filed their interrogatories and requests for production of documents with the court and served the Wilbourns with same. However, the Wilbourns failed to respond to either set of interrogatories or request for production within the requisite time frame.[5] On October 26, 1999, Meyer filed a motion to compel discovery which he withdrew later that day citing an agreed order between the parties extending the time for discovery that

[5] As evidenced by the record, Meyer also requested a response via correspondence dated August 27, 1999, and September 23, 1999.

had been entered on October 12, 1999. By letter of October 27, 1999, Shiben requested answers to his interrogatories but his correspondence went unanswered. Thus, he filed a motion to compel discovery on January 11, 2000, which was granted by the court in an order entered on January 21, 2000. The Wilbourns do no not dispute that their answer did not identify an expert who would testify regarding either the appropriate standard of care or the doctors' alleged deviation from the standards applicable to their respective specialties.

In an order entered on April 24, 2001, the court scheduled a pretrial conference for October 4, 2002, and ordered the parties to exchange discovery on or before September 18, 2002, including witness lists identifying all witnesses expected to be called at trial and a summary of their expected testimony. Pursuant to that order, trial was scheduled for November 18, 2002. In response, the Wilbourns took the depositions of Toms and Moots on July 16, 2001, and deposed Shiben and Shields on August 22, 2001. None of their testimony supported the theory that Shiben and/or Meyer deviated from the appropriate standard of care.

On October 25, 2001, Shiben filed a motion for summary judgment with a memorandum and affidavit in support thereof that was noticed for a hearing on December 19, 2001. Shiben argued that a claim for medical negligence requires "proof that the

defendant failed to exercise a degree of care and skill which is expected of a reasonably competent practitioner in the class to which he belongs, acting in the same or similar circumstances" and expert testimony is required to demonstrate that the physician "failed to conform to the standard of care." According to Shiben, the Wilbourns' failed to produce expert testimony and that omission was fatal to their claim. Therefore, he was entitled to summary judgment under Kentucky Rule of Civil Procedure (CR) 56, pursuant to which the opposing party must provide counter affidavits setting forth specific facts demonstrating a genuine issue of material fact for trial in order to defeat a motion for summary judgment.[6] Further, his care was "competent, reasonable and within the standard of care" and he "ordered the appropriate tests, at the appropriate time, and deferred to the specialist to interpret that test."

In a response filed on December 18, 2001, the Wilbourns argued that they could not be punished for failing to produce an expert until their time for producing such an expert had expired. Because they were "under no obligation to list their experts until September 18, 2002," summary judgment would

[6] According to Shiben: "Both Drs. Moots and Toms have indicated that the test was the appropriate test to determine if a brain tumor existed, and the test actually showed the existence of a brain tumor." The Wilbourns do not challenge this contention.

be premature and "akin to moving for a directed verdict before [the Wilbourns] ha[ve] finished calling all [their] witnesses." In their view, their affidavits[7] standing alone created a jury issue and, further, Shiben could not possibly prove that they "could not prevail under any circumstances" as required for summary judgment before Meyer had even been deposed. In an order entered on January 4, 2002, the court granted summary judgment in favor of Shiben.

On November 14, 2001, Meyer filed a motion for summary judgment with a memorandum and affidavit in support thereof, echoing the arguments of Shiben. By agreement of the parties, however, his motion was removed from the docket until his deposition could be taken on February 21, 2002.[8] Following his

[7] In their affidavits, taken on December 14, 2001, both Linda and Joe emphasized that they would "would certainly have sought further treatment and investigation of [Linda's] problems and condition" had they "not been convinced by [Shiben]" that there was no physical basis for her difficulties. According to their recollection, Shiben "never explained to [them] why he had requested a CT scan of the head without contrast" or discussed the possibility that her problems could be attributable to a brain tumor. Therefore, they "saw no need for any further treatment since these expert doctors, whom we trusted and depended upon, had made it very clear that there was no physical cause for [Linda's] symptoms." Aside from the foregoing reference and an acknowledgement that he had been "called in" during Linda's hospital stay of June 8 - June 11, 1998, at which time he and Shiben advised her to go to the mental health center, Meyer is not mentioned in either affidavit.

[8] There is no allegation that Meyer's testimony substantiates the Wilbourns' claims regarding Shiben.

deposition, Meyer filed a "re-notice" of his motion on February 26, 2002, and the Wilbourns responded on April 1, 2002, arguing that a factual issue existed because "either [Meyer] wrote the note in a confusing manner or [Shiben] misread [Meyer's] consult note" and, further, Meyer had admitted violating the standards of the American Psychiatric Association."[9] Noticeably absent

[9] In short, this argument is based on a faulty premise, i.e., that the purported APA guidelines attached to the Wilbourns' motion for summary judgment and brief on appeal were authenticated below and can therefore be properly considered as evidence of record for purposes of review. In making this assumption, the Wilbourns have neglected to comply with KRE 901 which, in relevant part, provides: "(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Subsection (b) of this rule contains an illustrative list of acceptable methods by which to satisfy this threshold requirement. The Wilbourns made no attempt to authenticate the guidelines during the proceedings below, instead attaching the documents upon which it relies to its motion and labeling them as an exhibit rather than authenticating them via affidavit, interrogatory or comparable means. Although the examples in KRE 901(b) are "[b]y way of illustration only, and not by way of limitation," the necessary implication is that some method must be utilized to verify the authenticity of such documents as a condition precedent to their admissibility.

Even assuming arguendo that the documents in question could accurately be described as self-authenticating, certification as defined in KRE 902 is required and is equally lacking. Presumably, the Wilbourns are implicitly arguing that this court should take judicial notice of these guidelines pursuant to KRE 201. This we cannot do. Because the Wilbourns failed to take the necessary steps below to authenticate the purported evidence, it stands to reason that said evidence is not of record on appeal, and, therefore, we are precluded from considering this extraneous information as our review is limited to the "pleadings, ..." See CR 56.03.

from the Wilbourns' response, however, was any reference to an expert medical opinion or an affidavit in support of their argument. In an order entered on April 10, 2002, the court granted Meyer's motion for summary judgment.

On January 15, 2002, the Wilbourns filed a motion to alter, amend or vacate the summary judgment entered in favor of Shiben that was noticed for a hearing on January 24, 2002. Shiben filed his response on January 23, 2002. In support of their motion, the Wilbourns argued that their "affidavits and response to the motion for summary judgment demonstrate the existence of material contested issues of fact relating to both inferred negligence and the applicable standard of care." In their view, the allotted time to produce experts did not expire until September 18, 2002, pursuant to the court's scheduling order. Thus, summary judgment was premature since they expected "to obtain relevant testimony within the time allotted" by the court's order "to support a jury issue" regarding a violation of the applicable standard of care and Shiben had not demonstrated the "impossibility of producing sufficient evidence at trial" to warrant a judgment in his favor. In an order entered on January 25, 2002, the court denied the Wilbourns' motion. The Wilbourns now appeal from both summary judgments.

On appeal, the Wilbourns cite no authority in support of their arguments which mirror those made below,[10] as do the arguments of both doctors. Our standard of review in this context is well established. CR 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, 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." Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[11] However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[12] The circuit court must view the record "in a light most favorable to the party opposing the motion for

[10] In the alternative, the Wilbourns contend that "no expert is absolutely needed on this issue" because, if you believe their version of events, Shiben conceded he was unable to isolate the cause of Linda's illness but also told them that depression was the sole cause of her symptoms. Point being, "if he did not know, but then told them that he did know, then he lied to them" and "[s]urely, lying to a patient is a deviation from the standard of care." Under their reasoning, this credibility issue creates a jury question.

[11] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

[12] Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992).

summary judgment and all doubts are to be resolved in his favor."[13]

On appeal from a summary judgment, we look to see "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."[14] Since there are no factual findings at issue, deference to the trial court is not required.[15]

In Blair v. Eblen,[16] relied upon by both Shiben and Meyer, Kentucky's highest court conclusively resolved any question regarding the proper standard to be applied in medical negligence cases. Rejecting the "community standard" rule previously employed in this context, the Court found that the jury in such cases should be instructed that the defendant "was under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances."[17] In so doing, the Court emphasized that

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13 Steelvest, supra, n. 11, at 480.

14 Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

15 Id.

16 Ky., 461 S.W.2d 370 (1970).

17 Id. at 373.

determination of the applicable standard should be left to the medical profession itself rather than the courts.[18]

It is beyond dispute that medical expert testimony is required in a medical negligence action to establish both the applicable standard of care and the defendant's failure to conform to that standard; negligence cannot simply be inferred from an "'undesirable result.'"[19] Here, the Wilbourns admittedly neglected to produce any expert medical testimony or evidence of record establishing the applicable standard of care in relation to gastroenterology or psychiatry, the respective professions of Shiben and Meyer. Equally lacking is any expert testimony establishing that either doctor deviated from the standard of care mandated by his profession — not surprising given that evidence of the former is necessarily required to demonstrate the latter.

In its entirety, the medical evidence offered by the Wilbourns consisted of the testimony given by Toms, Moots, Shiben and Meyer, all of which undermines rather than

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[18] Id.

[19] Perkins v. Hausladen, Ky., 828 S.W.2d 652, 654 (1992). Although there are two exceptions to this general rule, neither exception is implicated on the current facts as the Wilbourns implicitly concede by arguing that they would have produced the required expert testimony within the designated time frame rather than contending that such testimony is not necessary here.

strengthens their position and is contradicted only by their own lay testimony. Contrary to the Wilbourns' assertion, their lay opinions do not constitute the type of evidence required to create a question of fact for the jury. In the absence of expert medical testimony to establish the applicable standard of care and a deviation from that standard with respect to either Shiben or Meyer, no genuine issue as to a material fact existed and summary judgment was properly granted in favor of both doctors.

Despite the fact that over two years elapsed from the time the Wilbourns filed their complaint until summary judgment was granted in favor of Shiben and Meyer, the Wilbourns argue that summary judgment was premature. This argument hinges on a faulty premise, namely that the court could not grant summary judgment unless and until the discovery deadline had passed. In Hartford Insurance Group v. Citizens Fidelity Bank & Trust,[20] we were confronted with this issue, albeit in a different context:

> It is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so. Here, Hartford had a period of some six months between the filing of the complaint and the date of summary judgment in which to

[20] Ky. App., 579 S.W.2d 628 (1979).

> engage in discovery, or to inform the court, pursuant to CR 56.06, why judgment should not be entered or why a ruling on the motion for summary judgment should be continued.[21]

Here, the Wilbourns had ample opportunity to complete discovery or, at a minimum, identify an expert whose testimony would support their claim as required by the governing case law. In arguing that the court violated its own pretrial order by granting summary judgment prior to the expiration of the discovery deadline, the Wilbourns misconceive the function of such an order, which does not necessarily have any bearing on the proper time frame in which to file a motion for summary judgment. Although no arbitrary time limit applies in these instances and the court does retain discretion to find that sufficient time has not elapsed, no credible argument can be made that two years was inadequate on the facts presented, particularly considering the specific requests made by Shiben and Meyer.

With respect to the burdens of the parties on a motion for summary judgment, the adverse party is not required to file any sort of answer, defensive pleading or other response to a

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[21] Id. at 630.

motion for summary judgment.[22] However, when the moving party has presented evidence showing that despite the allegations of the pleadings there is no genuine issue of any material fact, as is the case here, "it becomes incumbent upon the adverse party to counter that evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact."[23] Because the evidence presented by Shiben and Meyer was of such a nature that no genuine issue of fact remained to be resolved, the omission of counter evidence, i.e., expert medical testimony, by the Wilbourns was fatal to their claims.

Because the circuit court properly granted summary judgment in favor of Shiben and Meyer, both judgments are affirmed.

KNOPF, Judge, CONCURS.

DYCHE, Judge, CONCURS IN RESULT.

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[22] Id.

[23] Id., quoting Neal v. Walker, Ky., 426 S.W.2d 476, 479 (1968).

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