

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000769-MR

RONNIE DeVARY and
KATRENA DeVARY

APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 98-CI-03824

BETH STRAUB and
LEXINGTON PHYSICAL THERAPY, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Ronnie DeVary and Katrena DeVary appeal from a summary judgment rendered by the Fayette Circuit Court in favor of Beth Straub and Lexington Physical Therapy, Inc. The judgment dismissed the DeVarys' physical therapy negligence claim against Straub and Lexington Physical Therapy. We affirm.

More than twenty years prior to the physical therapy treatment which led to the filing of this civil action, Ronnie DeVary was kicked by a horse and suffered a pneumothorax and

thoracic chest injury. It was then discovered that DeVary was a hemophiliac. DeVary's chest injury resulted in two lengthy hospitalizations for surgery on his chest and treatment of persistent chest infections.

During the 1990s, DeVary was seen annually at the hemophiliac clinic at the University of Kentucky Medical Center. During one of his visits, DeVary was asked by the hemophiliac physician to see a physical therapist in the clinic. The purpose of referring DeVary to a physical therapist was for an evaluation due to DeVary's bent posture and scoliosis.

On October 13, 1997, DeVary was evaluated by Beth Straub, a physical therapist employee of Lexington Physical Therapy. The evaluation occurred in the hemophiliac clinic at the medical center. Straub used soft tissue maneuvers to evaluate DeVary's scarred chest wall and instructed him in standard stretching exercises. DeVary was subsequently referred to physical therapist Chuck Hazle for further treatment.

During the time DeVary received physical therapy from Hazle, an opening in DeVary's old scar from his prior chest surgery developed. The opening would not heal, and DeVary was required to undergo additional surgical procedures. He incurred thousands of dollars in medical expenses and had multiple hospital visits and stays before the matter was finally resolved.

On October 23, 1998, the DeVarys filed a civil complaint in the Fayette Circuit Court, alleging negligence by Straub in the practice of physical therapy. A pretrial order was entered by the court on January 22, 2002, requiring the DeVarys to identify all witnesses, including expert witnesses, by no later than May 1, 2002. On May 1, 2002, the DeVarys moved the court to extend the deadline for identifying their expert witnesses. Although the appellees objected, the court granted the motion and gave the DeVarys until June 14, 2002, to identify those witnesses.

The June 14, 2002, deadline passed without the DeVarys disclosing their expert witnesses, and on June 17, 2002, they again sought an extension of the expert witness identification deadline. The court granted their motion to extend the deadline, and the DeVarys were ordered to identify their expert witnesses by no later than August 9, 2002. Although their motion was granted, the circuit court warned the DeVarys that no further motions to extend the deadline would be granted.

A pretrial conference was held in the case on August 9, 2002. The pretrial order entered on August 28, 2002, stated that no additional witnesses would be allowed after the final deadline of August 9, 2002, unless good cause was shown. On August 9, 2002, the DeVarys identified Richard A. Banton, Robert E. Mangine, and Betty Jo Bolze, all physical therapists, as

their expert witnesses.¹ The DeVarys did not identify a physician or medical expert to render an opinion on medical causation.

On November 4, 2002, nearly three months after the deadline for identifying expert witnesses, the DeVarys filed a witness list identifying four additional witnesses, including Dr. Daniel Kenady, a treating cardiothoracic surgeon. Straub and Lexington Physical Therapy subsequently moved the court to enter an order precluding the DeVarys from calling any witnesses on their November 4, 2002, witness list that had not been previously disclosed in a timely manner. Straub and Lexington Physical Therapy withdrew their objection with regard to Dr. Kenady because his deposition testimony was favorable to them. The circuit court granted their motion as to the other witnesses identified on the November 4, 2002, witness list.

Thereafter, Straub and Lexington Physical Therapy filed a motion for summary judgment on the ground that the DeVarys had not produced any qualified medical witness or witnesses who could testify that the actions of Straub caused the problems with DeVary's chest wound. In support of their motion, Straub and Lexington Physical Therapy noted that the physical therapists were precluded from rendering an opinion on medical causation because the court had previously granted an

¹ The DeVarys later withdrew Bolze as a witness.

unopposed motion by Straub and Lexington Physical Therapy to preclude such opinions. Further, they asserted in their motion that the testimony from Dr. Kenady concerning causation was clear that Straub's actions played no part in DeVary's condition. The court granted the motion, and this appeal by the DeVarys followed.

From the DeVarys' perspective, their problems with the issue of causation arose when Dr. Robert Campbell, the appellees' expert witness, testified in his deposition on December 20, 2002. Dr. Campbell testified that DeVary had a preexisting actinomycosis² deep in his thoracic chest cavity that had worked its way through fistulous tracts and had recently surfaced more than twenty years after DeVary's initial injury from being kicked by a horse. Dr. Campbell opined that the non-healing wound and treatment was related to that preexisting condition and was not caused by the actions of Straub.

The DeVarys' attorney claimed that this was a new or novel theory of causation and that additional expert testimony was needed by the DeVarys to contradict Dr. Campbell's testimony. In fact, the DeVarys' attorney contacted other experts following Dr. Campbell's deposition in an attempt to contradict his testimony. Straub's attorney filed a motion in

² This condition apparently involves a pocket of pus that lies within the chest cavity.

limine intended to prevent the DeVarys from calling witnesses that had not been identified previously, and the court granted the motion. Specifically, the court stated that Dr. Campbell's opinions were "not new or novel to this case." Thereafter, and within six weeks of Dr. Campbell's deposition and two weeks of the order excluding additional witnesses, the DeVarys' attorney received a report from Dr. Colby Atkins who opined that the medical records supported the theory that an injury had occurred in physical therapy that resulted in the multiple subsequent surgeries.

The DeVarys' first argument in this appeal is that the circuit court abused its discretion by failing to permit them to add Dr. Atkins as an expert witness to testify in opposition to Dr. Campbell's opinion concerning causation. In support of the argument, the DeVarys cite Ward v. Housman, Ky. App., 809 S.W.2d 717 (1991). In that case a panel of this court, by a 2-1 decision, reversed a summary judgment in favor of the defendant in a medical negligence case where the plaintiff failed to disclose the identity of her expert witness until well after the deadline for doing so. Id. at 720. The court reasoned that summary judgment should not be used as a sanctioning technique for the dilatory conduct of counsel. Id. at 719. Relying on the Ward case, the DeVarys argue that the circuit court in this case should have allowed them to identify Dr. Atkins as an

expert witness on the issue of causation even though the deadline for identifying expert witnesses had passed.

In response to the DeVarys' argument, Straub and Lexington Physical Therapy argue that the DeVarys had an obligation and burden to produce expert medical proof to support their theory of causation regardless of the testimony of Dr. Campbell and that the DeVarys failed to produce such evidence prior to the deadline. Straub and Lexington Physical Therapy assert that causation was an essential part of the DeVarys' *prima facie* case and "not a mere defense theory to be addressed in rebuttal." Further, the appellees maintain that the facts in the Ward case are distinguishable from those herein because the failures to meet the deadlines here "represent a pattern of dilatory acts and willful violations of the trial court's orders."

We agree with the appellees. Because causation is a necessary element to support the DeVarys' cause of action for physical therapy negligence, it was incumbent upon them to produce evidence to support their claim. This burden existed regardless of any causation evidence produced by the appellees. The mere fact that Dr. Campbell espoused a theory of causation in opposition to the DeVarys' claim did not relieve them, as the party with the burden of proof, from producing evidence to support their theory. As noted in Baylis v. Lourdes Hosp.,

Inc., Ky., 805 S.W.2d 122 (1991), "proof of causation requires the testimony of an expert witness." Id. at 124.

Along the same line, the DeVarys argue that fairness demanded that the court extend the deadlines to permit them to consult with and identify expert witnesses to rebut Dr. Campbell's theory. We reject this argument for at least two reasons. First, as noted above, it was incumbent upon the DeVarys to produce evidence of causation regardless of whether contrary evidence was produced by the appellees. Second, we believe the circuit court was acting within its discretion to control the discovery process and prevent abuse by requiring the DeVarys to comply with the original deadlines. See Hoffman v. Dow Chemical Co., Ky., 413 S.W.2d 332, 333 (1967), wherein the court held that a trial court has "broad power to control the use of the discovery process and to prevent its abuse." Because the DeVarys had been granted two prior extensions of the deadline to identify expert witnesses, and because the court had warned them that further extensions would not be granted, we conclude that the court did not abuse its discretion in failing to permit yet another extension.

We also believe the facts and circumstances in the Ward case are distinguishable from those herein. First, in the Ward case the appellate court disapproved of the circuit court's action because summary judgment was used as a sanctioning tool

and was granted even though the prevailing party had not moved for dismissal of the case. The case *sub judice* is different in that summary judgment was not used as a sanctioning technique for dilatory conduct of counsel; rather, the court merely enforced a previously set deadline and refused to grant yet another extension. Also, the Ward case is distinguishable from this one in that multiple extensions of the deadline had been previously granted herein.

The DeVarys' final argument is that summary judgment was not appropriate because they had two physical therapy experts who testified that Straub departed from the standard of care, had medical records establishing causation, and had a separate causation expert (Dr. Kenady). This argument is also without merit. First, while the two physical therapy experts may have testified concerning Straub's deviation from the applicable standard of care, they both admitted that they could not give medical causation testimony. Second, the medical records alone, in the absence of expert witness testimony, were insufficient to establish causation. Third, Dr. Kenady's testimony, which supported the appellees' theory of causation, was likewise insufficient to create a fact issue.

CR³ 56.03 states that summary judgment "shall be rendered forthwith 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 of material fact and that the moving party is entitled to a judgment as a matter of law." Furthermore, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Ky., 807 S.W.2d 476, 480 (1991). "The standard of review on appeal of a 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." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). We conclude that the circuit court correctly determined that the appellees were entitled to summary judgment. In the absence of expert witness testimony on behalf of the DeVarys to prove causation, there were no genuine issues as to any material fact and the appellees were entitled to a judgment as a matter of law.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

³ Kentucky Rules of Civil Procedure.

BRIEF AND ORAL ARGUMENT FOR
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