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NOT TO BE PUBLISHED

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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001039-MR

GLORIA DUNCAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 02-CI-005396

NORTON SUBURBAN HOSPITAL — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, MINTON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Gloria Duncan brings this appeal from a May 2, 2003, summary judgment of the Jefferson Circuit Court. We reverse and remand.

On July 18, 2002, appellant filed a *pro se* complaint[1] against *inter alia* appellee. Therein, it was alleged that appellee failed to meet the standard of care as to the

[1] It was established that an attorney from Ohio assisted appellant in drafting the complaint.

administration of anesthesia during a surgical procedure performed on July 19, 2001. She alleged to have suffered brain damage as a result of the surgery. On August 6, 2002, appellee filed an Answer and propounded Request for Admissions to appellant. The requests were personally served upon appellant.

On September 17, 2002, counsel for appellant entered an appearance and on October 3, 2002, filed a motion seeking leave of court to file a late Response to Admissions propounded by appellee. The circuit court ultimately denied appellant's motion to file the response by order entered December 6, 2002. On March 13, 2002, appellee moved for summary judgment. On May 2, 2003, the circuit court granted summary judgment in favor of appellee based on the admissions, thus precipitating this appeal.

Appellant contends the circuit court committed reversible error by denying her motion to file a late response to admissions propounded by the appellee. We must agree.

The admissions at issue were as follows:

> REQUEST NO.1:
>
> Please admit or deny that the Plaintiff or the Plaintiffs' representative did not consult with any qualified health care professional prior to the filing of this action, to determine if the care provided to Gloria D. Duncan by this specific Defendant, as distinguished from the Co-Defendants herein, deviated from the accepted standard of hospital care.

REQUEST NO. 2:

Please admit or deny that no qualified health care professional has criticized the care rendered by this specific Defendant, as distinguished from the Co-Defendants herein, to Gloria D. Duncan as having deviated from the accepted standard of hospital care.

REQUEST NO. 3:

Please admit or deny that Plaintiffs are unable to state through expert testimony that the care rendered by this specific Defendant, as distinguished from the Co-Defendants herein, to a reasonable degree of medical probability, caused Gloria D. Duncan's injuries.

REQUEST NO. 4:

Please admit or deny that Plaintiffs are unable to state through expert testimony that the care rendered by this specific Defendant, as distinguished from the Co-Defendants herein, to a reasonable degree of medical probability, was a substantial factor in the cause of Gloria D. Duncan's injuries.

REQUEST NO. 5:

Please admit or deny that the Plaintiffs are unable to state through expert testimony that the care rendered by this specific Defendant, as distinguished from the Co-Defendants herein, to Gloria D. Duncan deviated from the accepted standard of hospital care.

Ky. R. Civ. P. (CR) 36.01 governs requests for admissions and states, in relevant part, as follows:

> (1) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26.02 set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. . . .
>
> (2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons upon him. . . .

CR 36.02 governs the effect of admission and is as follows:

> Any matter admitted under Rule 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. An admission made by a party under Rule 36 is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding. (Amended effective October 1, 1971.)

Juxtaposing CR 36.01 and CR 36.02, we are of the opinion that an admission is deemed admitted if a party fails to respond within thirty (30) days after service or within such time as the court may specify; thereafter, the admission is conclusively established unless it is withdrawn or amended.

Here, appellant failed to respond within the specified time period (thirty days) to the admission; thus, the admission was conclusively established. Any effort to set aside that admission must proceed under CR 36.02. Even though appellant cited CR 36.01 in her motion to file late responses to admissions, we believe the appropriate procedure was to file a motion for withdrawal or amendment of admission under CR 36.02. We shall consider her motion as being filed under CR 36.02 and analyze this issue accordingly.[2]

Under CR 36.02, withdrawal or amendment of admission is allowed when "the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." Indeed, it has been pointed out that

[2] Fed. R. Civ. P. 36(b) is substantially similar to Ky. R. Civ. P. 36.02. The Federal Courts have recognized that a request to file late answers to admissions is equivalent to a request to withdraw admissions under Rule 36(b) and such request should be analyzed under Rule 36(b). See Warren v. International Brotherhood of Teamsters, 544 F.2d 334 (8th Cir. 1976); Herrin v. Blackman, 89 F.R.D. 622 (1981).

"[t]he burden is on the party resisting the amendment to prove prejudice." 6 Kurt A. Philipps, Jr., Kentucky Practice, CR 36.02 (5th ed. 1995).

In this case, we believe it evident that amendment of the admissions would certainly promote the presentation of the case upon the merits. Indeed, we can hardly say the interests of justice are furthered by having dispositive issues decided by way of a missed deadline. Moreover, appellee failed in this appeal and also failed below to present sufficient evidence of prejudicial effect. The admissions were propounded on August 6, 2002, and appellant filed the motion to respond on October 31, 2002, some twenty-seven days after its due date. We observe the circuit court did not make a finding of prejudice as required under CR 36.02 and failed to consider if the merits of the case would be subserved by amendment as also required under CR 36.02.

In sum, we are of the opinion the circuit court committed error by failing to allow appellant to amend the admissions under CR 36.02. Additionally, we view the admissions relied upon by the circuit court in its summary judgment as being less than dispositive of appellee's liability. See Lewis v. Kenady, Ky., 894 S.W.2d 619 (1994). As the circuit court erroneously relied upon the admissions in granting summary judgment, we conclude that summary judgment was improper. CR 56.

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is reversed and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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