RENDERED: AUGUST 27, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000448-MR

DEBORAH LAWSON, AS NEXT FRIEND
OF BRITTANY LAWSON, (A MINOR) APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 98-CI-00317

DR. JAMES D. DAWSON, M.D.;
SOUTHEASTERN KENTUCKY BAPTIST
HOSPITAL, BAPTIST HEALTHCARE SYSTEM,
INC., D/B/A BAPTIST REGIONAL MEDICAL
CENTER APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

BARBER, JUDGE: The Appellant, Deborah Lawson, as next friend of Brittany Lawson, a minor (Lawson), appeals from the decision of the circuit court denying her motion to continue the trial against James D. Dawson, M.D.,[1] from the trial court's dismissal of the case on the day of trial for failure to comply with CR

[1] In the notice of appeal Dr. Dawson is listed as "James D. Lawson, M.D." However, it appears that the correct spelling is "Dawson" and so we shall refer to him accordingly.

8.01, and from its subsequent denial of her motion to alter, amend, or vacate the judgment. Lawson also brings an appeal against Southeastern Kentucky Baptist Hospital, Baptist Healthcare System, Inc. d/b/a Baptist Regional Medical Center (Baptist) contending that an agreed order dismissing Brittany's claims against Baptist is invalid and should be set-aside. We vacate and remand.

The issues in this appeal do not involve the substantive claims of medical negligence in Lawson's complaint. Rather they involve whether the trial court should have granted a continuance, whether the court erred when it dismissed Lawson's action with prejudice for failure to comply with CR 8.01, and whether an agreed order dismissing Baptist from the case should be allowed to stand.

This action was filed by Lawson on behalf of her child Brittany on June 4, 1998. In her complaint Lawson alleged that due to the negligence of James D. Dawson, M.D. (Dr. Dawson) and the negligence of Baptist, Brittany Lawson suffers with severe quadriplegic cerebral palsy and seizure disorder. The conditions were alleged to be caused at the time of her birth and to be permanent in nature.

Quite a bit of discovery occurred in the case with close to twenty depositions being taken and interrogatories and documents produced by all. The case was originally set for

trial August 22, 2001, but was continued because the attorney for Baptist was pregnant. The case was again set for trial on February 19, 2002, but continued with the agreement of all parties due to major surgery that was scheduled for Brittany. The court then reset the case to be tried on December 3, 2002.[2]

Prior to each trial date the court issued a standard order requiring the parties to furnish the court with a brief at least five days prior to the trial that set forth the issues involved in the case along with a variety of other information including an itemized list of special damages. The order also required the parties to exchange certain information including a list of special damages at least 20 days prior to trial in the first two pretrial orders and 30 days prior to trial in the order that applied to the December 3, 2002 trial date.

Dr. Dawson also served interrogatories to Lawson on July 6, 1998. Interrogatory number 5 requested her to identify the amount of special damages claimed to have resulted from Dr. Dawson's negligence alleged in the complaint.

Lawson never filed her brief in compliance with the court's orders, and, although she answered the interrogatories propounded by Dr. Dawson, she never indicated the amount of damages sought.

[2] The first two trial dates were set by Division II of the Whitley Circuit Court and then the case was transferred pursuant to KRS 26A.015(2) to Division I of Whitley Circuit Court.

On October 17, 2002, Lawson's counsel filed a motion to withdraw as counsel of record. The motion was heard on November 4, 2002, and the court allowed counsel to withdraw. From the record there is no explanation for why counsel wished to withdraw. The court allowed Lawson 20 days in which to find new counsel to represent her daughter's interests in the suit but refused to change the trial date. During the hearing on the motion to withdraw Lawson was present and in response to whether she had obtained another lawyer stated, "I haven't signed a contract, but, yeah." Lawson further inquired as to whether this would change the December 3, 2002, trial date and the court responded that the trial would go on as scheduled.

On November 13, 2002 counsel on appeal filed on behalf of Lawson a motion to continue the trial set for December 3, 2002. The motion indicated that counsel was considering taking the case but needed the opportunity to review the record and properly prepare for trial in order to adequately represent Lawson. Dr. Dawson objected to the continuance. Although the motion was filed November 13, 2002, it was not heard until December 2, 2002, the day before trial. The court denied the motion.

On December 3, 2002, the case was called for trial and Lawson appeared on her own behalf along with counsel for Dr. Dawson. At that time Lawson again requested that the court

continue the case. After a long discussion the court indicated that it was inclined to grant her request but then changed its ruling and denied the motion. The court also considered the fact that Lawson had failed to comply with its pretrial orders or answer the interrogatories on special damages and dismissed the case pursuant to Fratzke v. Murphy, Ky., 12 S.W.3d 269 (1999).

Lawson asked the court to reconsider these decisions but the court denied the motion and this appeal followed.

In Lawson's appeal she also maintains that an agreed order entered March 28, 2002 dismissing her claims against Baptist with prejudice is invalid because it is founded upon a settlement in an amount over $10,000.00 for which no guardian was appointed to distribute monies, release claims, or report to the court as provided for in KRS 387.125(6) and KRS 387.280.

The first issue concerns whether the court should have granted Lawson's motions for a continuance of the trial. The standard on appeal for judging the circuit court's decision to deny Lawson's motions is whether or not the court abused its discretion. Wells v. Salyer, Ky., 452 S.W.2d 392, 395-396 (1970); Stallard v. Witherspoon, Ky., 306 S.W.2d 299, 300 (1957). Factors that the court should consider before making its determination are the "length of delay, number of prior continuances granted, inconvenience to the litigants, which

party caused the delay, availability of counsel, complexity of the case, and prejudice to the parties." Pendleton v. Commonwealth, Ky., 83 S.W.3d 522, 526 (2002).

An examination of these factors demonstrates that the equities lie with Lawson and the court should have granted the requested continuance. For example, the length of the delay requested was relatively short, Lawson herself requested only 30 more days. Whether or not counsel could be prepared in 30 days is still an open question but it is clear from the posture of the case that discovery had all but been completed and the only further actions to take were to file the trial brief as ordered by the court and prepare the case to be tried, i.e., arrange witness attendance, create exhibits, etc.

Two prior continuances had been granted but the first was not due to Lawson. Rather, it was due to the pregnancy of the attorney for the hospital. The second continuance was by agreement of all parties. Although due to Brittany's surgery, it appears from the record that Lawson offered to reschedule that surgery in order for the trial to go on, but this offer was refused in favor of continuance.

In the face of the fact that the requested time for a continuance was relatively brief, the inconvenience to the litigants is slight by comparison. The primary reasons Dr. Dawson cited to as being inconvenient were the time the case had

been pending and the fact that he had arranged for his experts to be at trial on December 3, 2002. Again, the requested time for delay was not overly long and the second reason pointed to by Dr. Dawson could have been avoided if the court had granted the motion.

Undoubtedly the delay was caused by Lawson. However, the delay was due to her attorney withdrawing from the case – a factor which we hesitate to construe against her when there does not appear of record any explanation for why the motion to withdraw was made nor did the court inquire into the matter on the day the motion was heard.

Clearly counsel was not available and the court was made aware that counsel would not be available on the day of trial.

This case is one of medical negligence alleging trauma at birth that resulted in severe and permanent handicaps. At least 17 depositions have been taken, most of them medical professionals in the capacity of an expert witness. Quite obviously this is an extremely complex case that the court should not expect Lawson to try without the aid of an attorney.

Dr. Dawson is not appreciably prejudiced by the requested continuance as explained above. However, the prejudice to Lawson is plain. Her case was ultimately dismissed

with prejudice as a direct result of the denial of the motion to continue.

Case law also supports our conclusion. For example, in Cox v. Spears, 181 Ky. 363, 206 S.W. 20 (1918), the plaintiff's attorney had withdrawn from the practice of law. Because of this, the plaintiff was unaware that the case had been submitted for judgment in her absence. When she discovered this she immediately asked the court to reconsider the order to submit and to continue the case so that she might offer some evidence. The court denied the motion but on appeal was reversed. The appellate court stated that the plaintiff should have an opportunity to present her case even if she had been dilatory in its preparation. Id. 206 S.W. at 21. That is, a "reasonable opportunity should have been granted for the preparation of the case."

Likewise, in Griffin v. Russell, 161 Ky. 471, 170 S.W. 1192 (1914), the Court reversed a denial of a motion to continue when the defendant's attorney withdrew on the day of trial. Although the defendant was able to obtain another attorney, the Court still held that he was prejudiced stating:

> It is well known that very few lawyers, however able they may be, can properly defend an important case involving complicated issues of fact and nice questions of law, upon the spur of the moment. Preparation is not only proper, but necessary, for the orderly and prompt administration of justice, as well as for the protection of the client's interests.

Id. 170 S.W. at 1193.

Due to the complexity of the case at bar there is no credible argument that can be made that an attorney or Lawson herself could be prepared to try the case between the time Lawson's original attorney withdrew on November 4, 2002 and the scheduled trial date of December 3, 2002. Thus, the court's insistence that it be tried on that date once it allowed Lawson's original attorney to withdraw (bear in mind that the court did not have to grant that motion) was tantamount to denying the "administration of justice." Id. See also, Reecy v. Reecy, 132 Ill., App. 2d 1024, 1027, 271 N.E.2d 91, 93 (1971) (continuance should have been granted in case where attorney was allowed to withdraw 16 days prior to scheduled trial date and new attorney needed time to prepare for trial).

The second argument by Lawson on appeal is that the court erred when it dismissed her case for failing to inform Dr. Dawson of any claimed special damages 30 days prior to trial and failure to seasonably supplement her interrogatory answer with that information according to Fratzke v. Murphy, Ky., 12 S.W.3d 269 (1999).

The failure of the trial court to grant Lawson's motion for a continuance obviously affected her compliance with the court's order and her ability to seasonably supplement her

interrogatory. Had the continuance been granted it is doubtful that any violation would have occurred. Therefore, we believe that the question of these violations is now moot.

Finally, Lawson argues that the agreed order dismissing Baptist should be set aside. Baptist replies that Lawson is precluded from raising this issue on appeal because the trial court never had the opportunity to consider the matter first, that Lawson is estopped by her voluntary agreement to the dismissal, and, in any event, the burden is on Lawson to ensure that any settlement was entered into correctly.

KRS 387.280 allows the court, after receiving evidence by way of affidavit or oral testimony, to approve a settlement made by one who is not a guardian or conservator for the minor if the amount of the settlement is under $10,000.00. If the court approves the settlement, then a release signed by the person to whom the court has ordered the money paid has the same effect as if it were signed by a duly appointed guardian.

KRS 387.125(6) allows a duly appointed guardian to compromise and release a claim on behalf of a minor with court approval.

There is no evidence in the record of the amount of settlement between Baptist and Lawson as next friend although Lawson asserts that it was for more than $10,000.00.

Jones by and through Jones v. Cowan, Ky., App., 729 S.W.2d 188 (1987), explains that a next friend, as Lawson is here, cannot compromise and settle a claim on behalf of a minor. Id. at 189. It further holds that a next friend may, in concert with the trial court, settle a lawsuit on behalf of a minor but, "unless a statutory guardian is appointed to receive and account for the proceeds and release the minor's claim, the judgment may be subject to attack." Id. at 190.

Scott v. Montgomery Traders Bank and Trust Co., Ky., 956 S.W.2d 902 (1997), makes clear that any settlement over $10,000.00 on behalf of a minor requires the appointment of a guardian and strict compliance is "necessary and expected." Id. at 904.

Neither in the statutes or the case law is it stated on whom the burden rests to ensure that a settlement on behalf of a minor is correctly executed. However, the Supreme Court noted in Scott that it was perplexed as to why the bank, not the next friend, had not complied with the requirements of the statute. Scott, 956 S.W.2d at 904. Therefore, we do not believe that the onus is necessarily on Lawson to secure the appointment of a guardian.

Accordingly, Lawson is not estopped from raising the issue that the settlement is invalid. The case law makes clear that any settlement on behalf of a minor without the approval of

the court and appointment of a guardian is subject to collateral attack. Baptist is presumed to know this and took its chances when it entered into a settlement without ensuring the proper procedures were followed to make it binding.

Since we do not have any evidence of record as to the amount of the settlement, this portion of the case is remanded to the trial court for further findings.

The judgment of the Whitley Circuit Court dismissing Lawson's suit is vacated and the case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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