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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-001995-MR

BEVERLY MCDANIEL AND
THOMAS AMOS, INDIVIDUALLY;
BEVERLY MCDANIEL AND THOMAS
AMOS, CO-ADMINISTRATORS OF
THE ESTATE OF ANNA AMOS — APPELLANTS

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 04-CI-00732

BHARATI MODY, M.D. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Beverly McDaniel and Thomas Amos, Individually and as Co-Administrators of the Estate of Anna Amos [hereinafter "Plaintiffs"], appeal

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

from various orders of the Barren Circuit Court whereby the trial court issued Kentucky Rules of Civil Procedure (CR) 11 sanctions against Plaintiffs' attorney, David W. Son, and denied Plaintiffs' motion for a new trial or to alter, amend, or vacate the order imposing sanctions. Finding no reversible error in the trial court's actions in this matter, we affirm.

On September 28, 2004, Plaintiffs filed a medical malpractice suit against Bharati Mody, M.D. and T.J. Samson Community Hospital. In their complaint, Plaintiffs alleged that Dr. Mody and T.J. Samson Community Hospital deviated from the standard of care when they failed to provide Beverly McDaniel and her unborn child, Anna Amos, with adequate medical care during McDaniel's pregnancy. McDaniel ultimately delivered the child prematurely and the child died.

Upon initiation of the claim, the parties engaged in discovery, which included exchanging interrogatories and conducting depositions. On August 22, 2006, Plaintiffs' counsel, David W. Son, filed an Expert Witness Disclosure pleading pursuant to CR 26.02(4). In this pleading, Son stated that he expected to call two expert witnesses to establish the Plaintiffs' medical malpractice claim: (1) Dr. Jeffrey J. Pomerance, and (2) Dr. William T. Baldwin. Dr. Baldwin was an economist expected to testify about the economic loss suffered by Plaintiffs as a result of the death of Anna Amos. Dr. Pomerance was to testify as follows at trial:

> Dr. Pomerance specializes in neonatal/perinatal medicine. Dr. Pomerance is expected to testify regarding the negligent and sub-standard medical care received by

Ms. McDaniel from her treating OB/GYN, Dr. Bharati Mody, and by T.J. Samson Community Hospital staff and employees. Dr. Pomerance is expected to testify that as a result of numerous deviations of the standard of care and negligent care provided by the aforementioned defendants, Ms. McDaniel delivered her child, Anna Amos, in her home after which Anna passed away and was unable to be revived.

Dr. Pomerance is also expected to testify that the failure to provide the basic standard of medical care by the defendants, and their failure to document telephone calls, contacts and care provided to Ms. McDaniel was well below the standard of care for medical care providers. The basic medical care required for Ms. McDaniel for the complaints alleged herein is to perform a speculum exam to evaluate bleeding and then to perform a digital exam of the cervix to evaluate dilation. None of these procedures were performed by any of the defendants at the relevant times herein.

Dr. Pomerance is expected to testify that on September 29, 2003, Ms. McDaniel treated at T.J. Samson Community Hospital with complaints of bleeding. The record merely notes "no visible bleeding on perineum," but there is no documentation as to whether Ms. McDaniel was having a little spotting on toilet paper, seeing blood drip into the toilet, passing blood with bowel movements, or any other documentation. The only affirmative documentation is that Ms. McDaniel did not have blood in her urine (per urinalysis). Dr. Pomerance is expected to testify that Ms. McDaniel should have had a speculum exam to assess whether there was any bleeding, bleeding from the cervix, or if there was bleeding from another part of the vagina, such as a ruptured vaginal cyst. No hospital staff or employee performed a digital exam of Ms. McDaniel's cervix to assess any dilation. Such an exam is contraindicated until the source of bleeding has been evaluated. Ms. McDaniel was discharged with a normal urinalysis with no diagnosis or explanation of her complaints.

. . . .

> Dr. Pomerance is expected to testify that the lack of medical care received by Ms. McDaniel from her treating OB/GYN, Dr. Bharati Mody, is clearly below the standard of care and negligent medical practices [sic]. Dr. Mody's acknowledgement at her deposition of receiving several phone calls of complaints from Ms. McDaniel, yet not putting any of them in her medical records, as well as seeing the patient for an evaluation, all supports this opinion. Dr. Mody even testified that her own standard of care for Ms. McDaniel, who was described as an at-risk patient, was not followed by Dr. Mody. Dr. Mody's regular office practices of keeping medical records and notations of care were also conspicuously not followed and the records are completely inadequate and fall will below the standard of care.
>
> Dr. Pomerance is also expected to testify that had Ms. McDaniel received the basic minimum medical care by her treating medical care providers, numerous means of prolonging the pregnancy and saving the child were present, and that had she received the basic minimum standard of medical care, that Ms. McDaniel's daughter, Anna Amos, would have had more than a viable chance to survive and be alive today.

Thereafter, the parties continued to prepare for trial and engaged in mediation. On October 20, 2006, Plaintiffs agreed to dismiss their claim against T.J. Samson Community Hospital. A March 7, 2007, trial date was set for the remaining parties.

On numerous occasions prior to trial, Dr. Mody's counsel attempted to schedule a deposition with Dr. Pomerance. However, Son was never able to produce Dr. Pomerance for any deposition dates. Eventually, Plaintiffs agreed to dismiss their remaining claim against Dr. Mody on March 20, 2007, as they were

unable to produce an expert to support their claim of medical malpractice. *See Perkins v. Hausladen*, 828 S.W.2d 652, 655 (Ky. 1992) (general rule is that expert testimony is required to establish liability in medical malpractice cases in absence of admissions by defendant doctor or *res ipsa loquitur*).

On March 19, 2008, nearly a year after the case was dismissed, Dr. Mody filed a motion for CR 11 sanctions against Plaintiffs' attorney, Son. Dr. Mody's counsel stated that he had obtained an ethics opinion allowing him to contact the Plaintiffs' expert, Dr. Pomerance. Having contacted and spoken with Dr. Pomerance, Dr. Mody's counsel alleged that Dr. Pomerance never tendered the opinions set forth in the Plaintiffs' Expert Disclosure pleading filed with the trial court on August 22, 2006. In light of the fact that Plaintiffs were forced to dismiss their medical malpractice claim after two and one-half years of needless litigation for lack of expert corroboration, Dr. Mody moved that Plaintiffs' counsel, Son, be sanctioned pursuant to CR 11 for filing a pleading that was not "well grounded in fact" and for filing a pleading "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." CR 11.

On May 13, 2008, the trial court entered a pre-hearing order setting a hearing on Dr. Mody's motion for CR 11 sanctions for July 1, 2008, and requiring the parties to prepare and submit pre-hearing statements and disclosures. That same day, Son responded to Dr. Mody's motion for CR 11 sanctions, specifically conceding that the trial court had authority and jurisdiction to rule on the motion.

Son argued that no violation of CR 11 had occurred and that sanctions were not appropriate in this matter.

On July 1, 2008, a hearing was conducted. Dr. Pomerance testified by telephone. After reviewing his records, Dr. Pomerance stated that he could find nothing which indicated that he ever reviewed or received payment for the review of Plaintiffs' case. He testified that he would have required medical records, which he did not have in this case, prior to the rendering of any medical opinions. He further stated that even if he had been given McDaniel's medical records, he never would have rendered the opinions attributed to him in Plaintiffs' Expert Disclosure pleading since he is not an obstetrician and would not be qualified to give such opinions. In fact, Dr. Pomerance specifically contended that the statements in Plaintiffs' Expert Disclosures pleading were "totally wrong" and that he "would never have given anybody opinions of that sort."

Under cross-examination by Son, Dr. Pomerance admitted that it was possible he had spoken with Son and that he had transmitted a copy of his resume to Son. However, Dr. Pomerance was adamant that he did not give any of the opinions set forth in the Plaintiffs' Expert Disclosure, explaining that such opinions were "all in obstetrics and I would never have said any of these things you quote me as saying." Maintaining that he had no recollection of ever speaking with Son, Dr. Pomerance opined that at most, he might have rendered an opinion as to the viability of a fetus of a certain age since neonatology was his area of expertise.

Son also testified at this hearing, claiming that he in fact had several conversations with Dr. Pomerance regarding the statements set forth in the Plaintiffs' Expert Witness Disclosure pleading. However, Son was unable to produce any phone records, emails, or notes to support his claim. Son explained that the phone records were destroyed after two months and that the notes were subject to attorney-client privilege. When asked about his paralegal who allegedly participated in this contact with Dr. Pomerance, Son explained that she was not available to testify as Son needed her to remain at his office that day.

After considering and summarizing the evidence set forth above, the trial court found that Son did not have a reasonable basis for the statements attributed to Dr. Pomerance in the August 22, 2006, Expert Witness Disclosure pleading that was signed and filed by Son. After considering an affidavit from the office manager/bookkeeper of the law firm utilized by Dr. Mody to defend this lawsuit, the trial court determined that this improper filing caused Dr. Mody to incur $19,591.04 in needless legal fees and expenses. Accordingly, the trial court entered an order on July 23, 2008, concluding that Son had violated CR 11and as such, Son was ordered to reimburse Dr. Mody's insurance company $19,591.04.

On August 4, 2008, Plaintiffs filed a motion for a new trial or to alter, amend, or vacate the trial court's July 23, 2008, order mandating sanctions against Son. On August 20, 2008, the trial court denied Plaintiffs' motion for a new trial or to alter, amend, or vacate its July 23, 2008 order, but did grant Plaintiffs a hearing on the proper amount of sanctions to be imposed against Son. On October

7, 2008, the office manager/bookkeeper for the law office utilized by Dr. Mody testified regarding the amount of legal fees and expenses incurred by Dr. Mody in the defense of this case. Dr. Mody's primary attorney also testified.

On October 9, 2008, the trial court entered an order affirming the CR 11 sanctions imposed against Son. In this order, the trial court found that Son's filing of the false CR 26.02 disclosures needlessly prolonged this litigation and as such, Dr. Mody was entitled to recover all legal fees and expenses incurred by her from the date the false disclosures were made, August 22, 2006, to the date the agreed Order of Dismissal was entered, March 20, 2007. Since testimony submitted at the October 7, 2008, hearing confirmed that Dr. Mody in fact incurred $19,591.04 in legal fees and expenses during this time period, the trial court affirmed the sanctions imposed in its July 23, 2008, order.

Plaintiffs now appeal to this Court from the October 9, 2008, order affirming sanctions, the August 20, 2008, order denying their motion for a new trial or to alter, amend, or vacate the trial court's July 23, 2008, order, and the July 23, 2008, order imposing sanctions. They claim the trial court committed reversible error in imposing CR 11 sanctions against Son and in allowing Dr. Pomerance to testify via telephone. For the reasons set forth herein, we disagree.

We first address Plaintiffs' argument that the trial court erred in permitting Dr. Pomerance to testify via telephone. Plaintiffs complain that allowing Dr. Pomerance to testify in this fashion was unfair and not in conformance with CR 32.01(c). However, CR 32.01(c) is inapplicable to the

determination of this issue as this rule simply sets forth when a deposition may be used at trial. Plaintiffs cite to no rule or authority which actually prohibits the use of telephonic testimony in Kentucky courts.

In fact, the use of telephonic testimony in civil matters is common in this Commonwealth. CR 43.04(1) directs that, unless otherwise provided, "the testimony of witnesses shall be heard under oath and orally in open court." While not physically present at the hearing, Dr. Pomerance's testimony was live, oral, under oath, and before the open court. There is no dispute or implication that the person who testified via telephone at the July 1, 2008, hearing was not Dr. Pomerance. Nor is there any question as to whether Dr. Pomerance testified of his own volition and free will. Further, Plaintiffs were granted full opportunity and leeway to cross-examine and confront Dr. Pomerance in open court. Upon careful consideration, we hold that Dr. Pomerance's testimony met the minimum requirements of CR 43.04(1) and thus, we reject Plaintiffs' argument that the trial court committed reversible error in permitting the telephonic testimony.

Even if we were to assume that Dr. Pomerance's telephonic testimony was not sufficient to satisfy the standard of submitting testimony "under oath and orally in open court" pursuant to CR 43.04(1), the testimony was admissible under CR 43.12. CR 43.12 permits motions to be heard via affidavit, or at the trial court's discretion, via "oral testimony or depositions." In this case, both the oral testimony and affidavit of Dr. Pomerance were submitted for the trial court's consideration. Accordingly, the trial court did not commit reversible error in

utilizing Dr. Pomerance's testimony through either or both of these mediums for the purpose of determining whether Son violated CR 11. Plaintiffs' arguments to the contrary are overruled.

We next consider Plaintiffs' argument that the trial court committed reversible error in the imposition of CR 11 sanctions against Son. CR 11 provides, in pertinent part, as follows:

> [t]he signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

A trial court is authorized to impose sanctions against any party or attorney who violates this rule. CR 11 ("If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .").

In *Clark Equip. Co., Inc. v. Bowman*, 762 S.W.2d 417 (Ky. App. 1988), this Court explained that the imposition of CR 11 sanctions should be reserved for "exceptional circumstances." *Id.* at 420. "The test to be used by the trial court in considering a motion for sanctions is whether the attorney's conduct,

at the time he or she signed the allegedly offending pleading or motion, was reasonable under the circumstances." *Id.*

This Court utilizes multiple standards of review when CR 11 sanctions are imposed. *Bowman*, 762 S.W.2d at 421. The trial court's findings are reviewed for clear error, but the legal conclusion that a violation of CR 11 occurred is reviewed *de novo*. *Id.* As for the standard when reviewing "the type and/or amount of sanctions imposed," a trial court's determination will not be set aside unless there is an abuse of discretion. *Id.*

Plaintiffs challenge the trial court's legal finding that Son's signature on the August 22, 2006, Expert Disclosure pleading was unreasonable under the circumstances. To support their argument, Plaintiffs point to testimony submitted by Son which indicated that Son did speak with Dr. Pomerance prior to the filing of the disclosure and that Dr. Pomerance did agree to be an expert in this case. Plaintiffs further state that Son actually consulted with another expert, Dr. Kathryn A. Cashner, and that it was Dr. Cashner who was the source of the opinions attributed to Dr. Pomerance in the disclosure. Son testified that he discussed Dr. Cashner's opinions with Dr. Pomerance. He further stated that after this discussion, he was under the impression that Dr. Pomerance agreed with Dr. Cashner's opinions.

While the above would have been acceptable evidence on which to premise a finding of reasonableness by Son, the trial court was well within its discretion to reject this testimony in favor of Dr. Pomerance's testimony that he

never would have rendered or agreed with such opinions. Plaintiffs contend the trial court was obligated to favor the testimony of Son in light of inconsistencies between Dr. Pomerance's affidavit and his testimony at the hearing. In his affidavit, Dr. Pomerance stated that he was never contacted at anytime by Son or Son's staff. However, at hearing, Dr. Pomerance conceded that he may have talked to Son at some point since Son had a copy of his resume and was familiar with the fact that Dr. Pomerance was out of the country in August 2006.

It is axiomatic that credibility determinations are solely within the province of the fact finder. *See* CR 52.01; *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). It was not clearly erroneous for the trial court to find the testimony of Dr. Pomerance more credible than the testimony of Son. It should be noted that Dr. Pomerance was consistent in his testimony that he did not recall ever speaking with Son or his staff. It was also undisputed that Dr. Pomerance never received medical records from Son or his staff, which Dr. Pomerance testified would have been required before he rendered opinions in any case. Conceding that he may have talked to Son or his staff briefly at some point was not fatal to the crux of Dr. Pomerance's testimony, nor did this admission preclude the trial court from utilizing this testimony to support its conclusion that Son violated CR 11 by filing an expert disclosure statement that was not formed after reasonable inquiry or well grounded in fact. After careful review of this record, we find no error as a matter of law in the trial court's conclusion that CR 11 sanctions were warranted in this case.

Plaintiffs next argue the trial court erred in failing to grant their August 4, 2008, motion for a new trial, or to alter, amend, or vacate the trial court's order imposing CR 11 sanctions. They claim they were entitled to a new trial pursuant to CR 59.01(g) on grounds of "newly discovered evidence." CR 59.01(g) provides that "newly discovered evidence" can be grounds for a new trial, but only if the evidence "could not, with reasonable diligence, have [been] discovered and produced at the trial."

The "newly discovered evidence" offered by Plaintiffs is the discovery of a tax identification number for Dr. Pomerance in Son's files and the willingness of Son's paralegal to testify as to the contact made by Son and his staff with Dr. Pomerance. Both of these items could have easily been discovered and produced at the July 1, 2008, hearing in this matter. Accordingly, we find no abuse of discretion in the trial court's denial of Plaintiffs' CR 59.01(g) motion for a new trial on grounds of "newly discovered evidence." *See Glidewell v. Glidewell*, 859 S.W.2d 675, 677 (Ky. App. 1993) ("The trial court is granted broad discretion in ruling on a CR 59.01 motion based on newly discovered evidence.").

In their final argument, Plaintiffs contend that the amount of sanctions awarded in this matter was an abuse of discretion. They argue that they were not given sufficient opportunity in which to examine Dr. Mody's legal bills or to cross-examine Dr. Mody's attorneys as to the content of these bills. However, on August 20, 2008, the trial court granted Plaintiffs' motion for a new trial on the issue of determining the proper amount of sanctions to be imposed against Son. At this

hearing, Plaintiffs were afforded the opportunity to review detailed billing records and to cross-examine both the office manager/bookkeeper of the law firm employed by Dr. Mody and Dr. Mody's primary attorney.

On appeal, Plaintiffs argue that several of the charges admitted at this hearing were either duplicative or excessive. They further argue that the primary attorney's supervisor, who also billed time, was not present or made available to testify. Upon careful review, we find no abuse of discretion in the trial court's calculation of sanctions. Plaintiffs were afforded ample opportunity to review and cross-examine witnesses regarding the proper calculation of sanctions against Son. Nothing submitted by the Plaintiffs in this appeal is sufficient to warrant setting aside the trial court's findings on this issue.

Finding no reversible error by the trial court, we hereby affirm the Barren Circuit Court's October 9, 2008, order affirming CR 11 sanctions against Plaintiffs' attorney, David W. Son, the August 20, 2008, order denying Plaintiffs' motion for new trial or to alter, amend, or vacate the trial court's July 23, 2008, order, and the July 23, 2008, order imposing sanctions.

ALL CONCUR.

BRIEF FOR APPELLANTS:

David W. Son
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jason E. Taylor
Louisville, Kentucky