RENDERED: MAY 20, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000013-MR

SHAWNA ROSS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 07-CI-010656

JOHN E. HARPRING, M.D. AND
NEUROSURGICAL INSTITUTE OF
KENTUCKY, P.S.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: This is a medical malpractice action in which Shawna Ross appeals from a summary judgment granted by the Jefferson Circuit Court in favor of Dr. John E. Harpring and Neurosurgical Institute of Kentucky (NIK). The circuit court found that Ross's failure to present medical expert testimony that

Dr. Harpring's conduct when treating Ross fell below the standard of care and caused her injury, warranted summary judgment. We affirm.

Dr. Harpring, a member of NIK, performed surgery on Ross for the purposes of removing her disk at C5-6; removing osteophytes; and fusing at the vertebrae at C5-6. She alleges that because Dr. Harpring negligently failed to remove the osteophyte at C6 she underwent two additional surgeries on her cervical spine.

Dr. Villanueva performed the two subsequent surgeries. He allegedly informed Ross and her legal counsel that it would have been preferable for Dr. Harpring to remove the osteophyte through the back and that Dr. Harpring negligently performed Ross's first surgery. On October 2, 2007, Ross filed this malpractice action against Dr. Harpring based in part on Dr. Villanueva's statements.

Subsequent to the filing of the complaint, Dr. Villanueva became a member of NIK. At the time summary judgment was granted, no formal statement or affidavit was obtained from Dr. Villanueva and he had not been deposed.

When requested by interrogatories to identify medical experts, on July 15, 2008, Ross's counsel responded that the experts had not yet been identified but that the answer would be "supplemented pursuant to any pretrial order issued by this Court and consistent with CR 26.02." At a status conference on March 23, 2009, the parties and the court agreed that Ross's disclosure deadline was June 1,

2009, and Dr. Harpring's and NIK's deadline was August 29, 2009. A trial was scheduled for December 8, 2009.

After Ross failed to identify an expert and with the trial date scheduled in two months, on October 6, 2009, Dr. Harpring and NIK moved for summary judgment. Dr. Harpring submitted his affidavit stating that the procedures he performed in treating Ross met or exceeded the applicable standard of care and that the treatment did not cause Ross's injury. The motion did not cite discovery violations as its basis but asserted that Ross's failure to identify a medical expert witness was detrimental to her claim. Ross did not respond to the summary judgment motion.

On November 2, 2009, a pretrial conference was held and the summary judgment motion was heard. Ross's counsel did not attend.

After applying the summary standard set forth in *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476 (Ky. 1991), and based on the record, the circuit court concluded:

> Without having a medical expert testify that Dr. Harpring's approach or conduct in treating Ms. Ross fell below the standard of care and thus led to her injury, Ms. Ross' case against Defendants must fail.
>
> There being no genuine issue of material fact and because Defendants are entitled to judgment as a matter of law, the Court shall grant Defendants' motion for summary judgment.

Nine days after the entry of summary judgment, Ross filed a motion to vacate pursuant to CR 59.05. In support of the motion, Ross's counsel submitted

his own affidavit wherein he stated that he had discussed with defense counsel a potential problem with Dr. Villaneuva's testimony because of his association with NIK. He stated that defense counsel then "agreed to attempt to resolve the matter in some other fashion." To explain his absence from the pretrial conference, counsel stated that his office received a telephone call from defense counsel's office on October 30, 2009, regarding the November 2, 2009, pretrial conference. The secretary informed defense counsel that Ross's attorney was not available and would not be present. Notably absent from counsel's affidavit and the record is any affirmative evidence regarding Dr. Villaneuva's testimony or any medical expert testimony regarding the standard of care and causation.

In response, defense counsel submitted his affidavit. He stated that on three occasions he spoke with a paralegal in opposing counsel's office but that counsel did not return his calls. He also attached correspondence from opposing counsel indicating that he was aware of the pending summary judgment motion and expressing concern regarding Dr. Villanuena's testimony. In response, defense counsel contacted Ross's counsel's office but counsel did not return his call. He also stated that on the day of the pretrial conference, he contacted opposing counsel's office advising that the pretrial conference was to occur and, when counsel was not in the office, called his cell phone and left a message for him to return his call. The call was not returned. When no representative for Ross appeared at the pretrial conference, he called counsel's office and was told that

another attorney would be requested to attend the conference. However, that attorney telephoned and stated that neither he nor Ross's counsel would attend.

After considering the arguments advanced for and against the motion to vacate its summary judgment, the circuit court reiterated its original findings:

> Having considered the arguments of counsel, the Court adopts the substantive findings made in its November 2nd Order granting the Defendant's Motion for Summary Judgment. Specifically, giving due consideration to criticisms of Dr. Harpring attributed to Dr. Wayne Villanueva, the Court finds that even in the light most favorable to the Plaintiff, these statements fail to establish the existence of the requisite expert testimony that are required in cases such as the matter before the Court. Without having a medical expert **willing to testify** that Dr. Harpring's approach or conduct in treating Ms. Ross fell below the standard of care and thus led to her injury, Ms. Ross' case against Defendants must fail. Accordingly, the Court hereby denies Plaintiff's Motion to Vacate Judgment. (emphasis original).

Ross filed this appeal requesting that the summary judgment be reversed.

For clarity, we first address Ross's suggestion that summary judgment was entered as a sanction for the failure to comply with the court's discovery orders. *See Ward v. Housman*, 809 S.W.2d 717, 719 (Ky.App. 1991). In this case, sanctions were not sought nor discussed in the circuit court's order. The circuit court explicitly stated that the basis for the summary judgment was Ross's inexplicable failure to produce an expert witness over two years after the action was filed and the consequent total lack of proof to create a jury issue. Thus, the only question presented is whether summary judgment was proper because no genuine issue of material fact existed.

Steelvest, Inc. offers the standard for granting a summary judgment in this Commonwealth which requires that it be granted only when it appears impossible for the nonmoving party to prevail at trial. *Id*. at 483. Although a stringent standard, summary judgment is not precluded by the opposing party's reliance on the pleadings. *Brock v. Pilot Corp*., 234 S.W.3d 381 (Ky.App. 2007). Summary judgment is proper after the opposing party is afforded ample opportunity to complete discovery yet fails to offer controverting evidence. *Suter v. Mazyck*, 226 S.W.3d 837 (Ky.App. 2007).

> The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since 'hope springs eternal in the human breast.' The hope or bare belief . . . that something will 'turn up,' cannot be made basis for showing that a genuine issue as to a material fact exists.

Neal v. Welker, 426 S.W.2d 476, 479-480 (Ky. 1968).

Much has been written regarding summary judgments in the context of medical malpractice cases and, therefore, we write with established precedent regarding the requirement of medical expert testimony to support a plaintiff's claim. The summation provided in *Blankenship v. Collier*, 302 S.W.3d 665, 670 (Ky. 2010), accurately reflects the law:

> Under Kentucky law, a plaintiff alleging medical malpractice is generally required to put forth expert testimony to show that the defendant medical provider failed to conform to the standard of care. *Perkins v. Hausladen,* 828 S.W.2d 652, 655–56 (Ky. 1992). Expert testimony is not required, however, in *res ipsa loquitur* cases, where "the jury may reasonably infer both

> negligence and causation from the mere occurrence of the event and the defendant's relation to it", and in cases where the defendant physician makes certain admissions that make his negligence apparent. *Id.* (*quoting Restatement (Second) of Torts,* Comment b, p. 157). Medical malpractice cases can therefore be divided into two categories: cases where the parties do not dispute the need for expert testimony, which encompass the vast majority of medical malpractice claims, and cases where the plaintiff disputes the need for expert testimony because he contends one of the narrow exceptions applies.

Ross admits that neither exception applies to her case and, as a consequence, concedes that expert medical testimony was necessary to withstand summary judgment. Her argument is that the summary judgment was premature and, given additional time, she could have produced affirmative evidence in her favor by deposing Dr. Villanueva.

In *Blankenship*, it was explained that if the need for an expert is not disputed, the trial court is not required to enter a separate ruling informing the plaintiff that his case requires expert testimony before considering a summary judgment motion based on the plaintiff's failure of proof. "When it is evident that the plaintiff has not secured a single expert witness and has failed to make any expert disclosures after a reasonable period of time, there truly is a failure of proof and a summary judgment motion is appropriate." *Id*.

With the standard of review as our guide, it is helpful to highlight the undisputed factual scenario presented:

> (1) The summary judgment motion was filed two years after Ross's complaint was filed;

(2) Despite a court ordered discovery deadline, Ross did not disclose a medical expert witness;

(3) Ross did not request an extension of the discovery deadline;

(4) Ross did not seek a postponement of the trial date;

(5) Ross did not respond to the motion for summary judgment;

(6) Ross's counsel did not attend the summary judgment hearing;

(7) Ross did not depose a medical expert witness, including Dr. Villanueva.

Ross did not secure an expert witness and failed to make any expert disclosures in accordance with the court's order. When confronted with a motion for summary judgment, Ross did not respond. Moreover, in her CR 59.05 motion and even in her argument to this Court, there is a complete failure to explain why Dr. Villanueva or any expert had not been deposed in the two years since the complaint was filed. Under the circumstances, there is a complete failure of proof and summary judgment was appropriate.

Based on the foregoing, the summary judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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