RENDERED: JULY 8, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000801-MR

BETH A. THOMPSON,
As Executrix of the Estate of
SAMMY EUGENE THOMPSON, SR. APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE DAVIS, JUDGE
ACTION NO. 08-CI-01601

ASHLAND HOSPITAL CORPORATION
d/b/a KING'S DAUGHTERS MEDICAL CENTER APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,[1] CHIEF SENIOR JUDGE.

STUMBO, JUDGE: Beth A. Thompson ("Ms. Thompson") appeals from an order of the Boyd Circuit Court granting summary judgment in favor of Ashland

[1] Chief Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Hospital Corporation d/b/a/ King's Daughters Medical Center ("KDMC"). Ms. Thompson sued KDMC after her father fell off a table and was injured as he was about to receive an x-ray. Thompson contends that the trial court erred in concluding that her failure to provide expert testimony on the issues of standard of care and causation was fatal to her claim. We conclude that because Ms. Thompson is prosecuting a claim of ordinary negligence rather than complex medical negligence, the trial court erred in determining that expert testimony was required to instruct the jury on KDMC's standard of care and its alleged breach of that standard. Accordingly, we reverse the summary judgment on appeal and remand the matter for further proceedings.

On August 11, 2008, Sammy Thompson ("Mr. Thompson") was admitted as a patient at KDMC in Ashland, Kentucky. One week later, and while still a patient, Mr. Thompson was taken to an area of the KDMC facility to receive an x-ray. According to the record, Mr. Thompson – who allegedly was designated by KDMC as being at a high risk of falling due to his medical condition, and who was semi-comatose – was placed without restraints or side rails on a 29" wide table to undergo the scan. One technician was present in the room with Mr. Thompson. When the technician allegedly stepped away from the table,[2] Mr. Thompson fell off the table and onto the floor. Mr. Thompson's head and face struck the floor, allegedly resulting in serious bodily injury and additional medical costs.

[2] KDMC states that the record contains no evidence that the technician stepped away from the table.

Sometime thereafter, Mr. Thompson died for reasons apparently not associated with the fall. His daughter, Ms. Thompson, in her capacity of executrix, then filed the instant action in Boyd Circuit Court on December 8, 2008, alleging that KDMC's ordinary negligence resulted in Mr. Thompson's fall and resultant injuries. Ms. Thompson alleged that KDMC breached its duty of care by placing her semi-conscious, heavily sedated father on the x-ray table without any restraints or side rails, which proximately resulted in his fall and resultant injuries and costs.

The matter proceeded in Boyd Circuit Court, where KDMC was served with interrogatories and various motions were made and ruled upon. One ruling required Ms. Thompson to identify any expert witnesses by January 30, 2010. After Ms. Thompson failed to comply with the order, she filed a written motion on February 1, 2010, seeking 30 additional days to identify her experts. The motion was sustained, which gave Ms. Thompson until March 5, 2010, to disclose the witnesses. Ms. Thompson failed to disclose the names of any expert witnesses by the March 5, 2010 deadline.

After waiting an additional three weeks, KDMC filed a motion for summary judgment. As a basis for the motion, KDMC argued that Ms. Thompson's failure to produce an expert witness prevented her from establishing either the correct standard of care and/or that KDMC's alleged breach of that standard of care proximately resulted in Mr. Thompson's injuries. Ms. Thompson did not file a responsive pleading.

On April 5, 2010, the trial court rendered an Order and Summary Judgment, which sustained KDMC's motion upon finding that there were no genuine issues of material fact and that KDMC was entitled to a judgment as a matter of law. As a basis for the judgment, the court opined that Ms. Thompson's failure to present expert testimony on the issues of a breach of a standard of care, and of causation, resulted in her inability to meet her burden of proof if the matter proceeded to trial. This appeal followed.

Ms. Thompson now argues that the trial court erred in sustaining KDMC's motion for summary judgment. Specifically, Ms. Thompson contends that the court erred in concluding that she could not prosecute her action without providing expert testimony on the issues of whether KDMC had a duty to prevent Mr. Thompson from falling off the table, and whether it breached that duty which proximately resulted in Mr. Thompson's injuries. While acknowledging that a complicated medical negligence action may require expert testimony to establish duty, breach and causation, Ms. Thompson notes that she is prosecuting an ordinary negligence action in which no medical procedure – much less a sophisticated medical procedure – was performed. She contends that genuine issues of material fact remain for adjudication, and that the trial court erred in failing to so rule.

In order to prevail in a negligence action in Kentucky, a plaintiff must offer proof that the defendant owed the plaintiff a duty of care, which the defendant breached that duty, and that injury proximately resulted from the breach.

Pathways, Inc. v. Hammons, 113 S.W. 3d 85 (Ky. 2003). In a medical negligence action, the plaintiff must prove that the treatment given was below the degree of care and skill expected of a reasonably competent practitioner, and that the negligence proximately caused injury or death. *Reams v. Stutler*, 642 S.W. 2d 586 (Ky. 1982). As a rule, the complexity of medical procedures requires a medical negligence plaintiff to rely on expert testimony rather than lay testimony to establish duty, breach, causation and injury. *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010). Conversely, ordinary or simple negligence actions do not require expert testimony. *Id*. The test for distinguishing between medical negligence and ordinary or simple negligence is ". . . whether the case involves a matter of science or art requiring special knowledge or skill not ordinarily possessed by the average person or is one where the common everyday experiences of the trier of the facts . . . are sufficient in order to reach the proper conclusion. In the former, expert opinion testimony is ordinarily required to aid the trier of the facts; in the latter it is unnecessary." *Andrew v. Begley*, 203 S.W.3d 165 (Ky. App. 2006), quoting *Twitchell v. MacKay,* 78 A.D.2d 125, 127-128 (N.Y.A.D.1980).

The question for our consideration, then, is whether the facts surrounding Mr. Thompson's fall involve a matter of science or art requiring special knowledge or skill not ordinarily possessed by the average person, or conversely whether the common everyday experiences of a jury are sufficient in order to reach the proper conclusion. *Andrew*, *supra.* Having closely considered the entire record, we cannot conclude that an average person would be unable to

discern without the benefit of expert testimony why Mr. Thompson fell off the table, nor why the fall allegedly resulted in injury. The facts of this action are more akin to a routine "slip and fall" negligence action than a medical malpractice action involving complex and sophisticated medical procedures which are outside the knowledge or skill ordinarily possessed by the average person. That is to say, whereas an average person will not possess the knowledge or skill required to consider the complexities of sophisticated medical procedures, such a person's "common everyday experiences" will allow him or her to determine why an allegedly sick, semi-comatose individual fell off a table. Additionally, Ms. Thompson, through counsel, repeatedly alleged in her complaint that KDMC engaged in ordinary negligence rather than medical negligence. While her usage of this language is by no means controlling, it does bolster her assertion that the instant action has from the outset been about KDMC's alleged ordinary negligence rather than medical negligence. Finally, we cannot conclude that every alleged act of negligence occurring in a hospital setting must be characterized as medical negligence. The determination of whether the alleged negligence is ordinary negligence or medical negligence is fact-based, and the facts now before us do not compel us to conclude that the trier of fact would be unable to reach a proper conclusion absent hearing expert testimony.

KDMC directs our attention to *Blankenship*, *supra*, in support of its contention that summary judgment was properly rendered after Ms. Thompson failed to produce an expert who would testify as to the elements necessary to prove

medical negligence. Specifically, it maintains that such testimony was necessary as to the standard of care, how that standard allegedly was breached by KDMC, and how that alleged breach actually caused Mr. Thompson's injuries. *Blankenship* held in relevant part that summary judgment was properly rendered after the plaintiff failed either to produce an expert witness or to claim that no such witness was necessary in his medical malpractice action. *Blankenship* is distinguishable from the facts before us, however, in that the *Blankenship* action centered on a physician's alleged negligence in failing to properly diagnose and treat appendicitis. That is to say, *Blankenship* addressed a medical malpractice claim, which involved sophisticated diagnostic and medical treatment requiring special knowledge or skill not ordinarily possessed by the average person. *Andrew*, *supra.* Whereas an average person could not manage the emergent diagnosis and treatment of acute appendicitis as found in *Blankenship*, such a person could – with the application of "common everyday experiences" – understand why and how a sick person fell off a table. *Id*. Since we cannot characterize Ms. Thompson's action as a medical malpractice claim requiring her usage of expert witnesses, we must conclude that KDMC's reliance on *Blankenship* is misplaced.

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 as to any material fact and that the moving party is entitled to a judgment as a matter of

law." CR 56.03. "The 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 Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky.1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he 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,* 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Ms. Thompson and resolving all doubts in her favor, we cannot conclude that it appears impossible for Ms. Thompson to prevail at trial. The fact that Ms. Thompson's counsel inexplicably failed to meet two discovery deadlines or file a responsive pleading to KDMC's motion for summary judgment does not alter this conclusion. Ultimately, the dispositive questions are whether the trier of fact would be unable to consider the issues presented without the benefit of expert testimony, and whether it appears impossible that Ms. Thompson could prevail at trial absent such testimony. We must answer these questions in the negative, and accordingly conclude that summary judgment was not warranted.

For the foregoing reasons, we reverse the summary judgment of the Boyd Circuit Court and remand the matter for further proceedings.

LAMBERT, CHIEF SENIOR JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I concur with the majority opinion, but write separately to point out that, to reverse the circuit court's summary judgment, we are taking the extraordinary approach of engaging, *sua sponte*, in a palpable error review under CR 61.02. *See Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997) ("Court of Appeals *sua sponte* . . . reasoned that the trial court's [ruling] constituted palpable error under CR 61.02."); *but see Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008) ("Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to [Kentucky Rule of Criminal Procedure] RCr 10.26 [worded identically to CR 61.02] *unless such a request is made* and briefed by the appellant." Emphasis supplied.).

Because Ms. Thompson never disputed the need for an expert witness while the case was before the circuit court – and, in fact, asked the circuit court for additional time to identify her own expert – the issue was never preserved for our review. She even failed to respond to the summary judgment motion. Ms. Thompson acknowledged her failure to preserve the issue before the circuit court by her subsequent failure to tell this Court "whether the issue was properly preserved for review and, if so, in what manner." CR 76.12(4)(c)(v). It has long

been our Supreme Court's view that specific grounds not raised before the trial court, but raised for the first time on appeal, will not support a favorable ruling on appeal. *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989) ("The Court of Appeals is without authority to review issues not raised in or decided by the trial court."). As our high court recently said,

> when an appellate court determines to reverse a trial court, it cannot do so on an unpreserved legal ground unless it finds palpable error, because the trial court has not had a fair opportunity to rule on the legal question. Though this policy of placing the burden on the appealing party to have raised an issue before the trial court may appear unfair, since it essentially favors affirming the lower court, the simple fact is that the burden must be placed on someone and there must be a default position, either favoring affirming or reversing, with which to approach cases. Our cases have recognized the potential dissonance of such a rule but have still approved it. *See* [*Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co*., 326 S.W.3d 803, 812 n. 3 (Ky. 2010)] (noting that a court may affirm for any reason appearing in the record but must reverse only for preserved issues). Ultimately, it is the responsibility of the movant to put the legal ground before the court, because it is, after all, his motion, and he bears the burden of proof and persuasion.

Fischer v. Fischer, --- S.W.3d ----, 2011 WL 1087156, *6 (Ky. March 24, 2011), *pet. for reh. pending*.

Furthermore, Ms. Thompson has not asked this Court to review the issue under the palpable error standard. Therefore, we are perforce concluding that the case before us presents "extreme circumstances amounting to a substantial miscarriage of justice [.]" *Shepherd*, 251 S.W.3d at 316. Although I am not

entirely convinced that the injustice here is so extreme as to justify the implementation of this extraordinary level of review, I do agree with the majority that the circuit court's "find[ing] that [Ms. Thompson] is required to present expert testimony in support of her medical negligence claims" is not supported by a consideration of the entire record. CR 56.03; *see also Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997) (citation omitted) ("[P]alpable error must result from action taken by the Court rather than from an act or omission by the attorneys or litigants.").

Our decision today gives Ms. Thompson, and her legal counsel, the opportunity – arguably a second opportunity – to get to the merits of her claim. In the larger context, I fear it will do nothing to elevate the practice of law.

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