

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001981-MR

SIMONE JONES AND
DWIGHT JONES

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 09-CI-02614

CYNTHIA H. HART, M.D.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Simone Jones and her husband, Dwight Jones, appeal from an order of the Hardin Circuit Court granting summary judgment in favor of Cynthia H. Hart, M.D. The circuit court found the Joneses' failure to present medical expert testimony to support their medical malpractice claim warranted summary judgment. We affirm.

Simone underwent a routine screening mammogram on December 18, 2007, at Hardin Memorial Hospital that was read by Dr. Srikala Ramaswamy.¹ Based on Dr. Ramaswamy's report, a diagnostic mammogram of Simone's right breast was performed on January 21, 2008, and read by Dr. Hart who determined the images did not suggest malignancy.

Simone returned for her annual screening mammogram on December 18, 2008. Because the mammogram was highly suspicious for malignancy, a diagnostic mammogram and ultrasound were performed and read by Dr. Hart. A biopsy performed on December 31, 2008, revealed the presence of carcinoma.

Simone was seen at James Graham Brown Cancer Center where she was given the option of a lumpectomy, single mastectomy or a double mastectomy. Although she only had signs of cancer in her right breast, Simone elected to have a double mastectomy to reduce the chance of cancer reoccurring.

On January 30, 2009, Simone had a double mastectomy. A subsequent pathology report revealed Stage II cancer in the right breast. No cancer was found in the left breast. Following her mastectomy, Simone underwent chemotherapy and radiation.

A complaint was filed on December 10, 2009, alleging Simone experienced increased pain and suffering and additional medical treatment as a result of the delay in diagnosis. Dr. Hart answered, denying any breach of the standard of care and causation.

¹ Hardin Memorial Hospital and Dr. Ramaswamy were named as defendants but were dismissed prior to time of the entry of the order appealed.

In February 2011, Dr. Hart filed a motion for summary judgment alleging no expert opinion regarding the standard of care and causation had been produced. In support of her motion, Dr. Hart filed an affidavit stating she acted within the standard of care and did not cause any injuries alleged by Simone. After hearing arguments, the motion was remanded with an agreement that the Joneses identify an expert witness. In June 2011, the Joneses filed expert disclosures pursuant to Kentucky Rules of Civil Procedure (CR) 26.02 identifying as an expert, Dr. Barbra Savader, a radiologist, who they anticipated would testify Dr. Hart deviated from the relevant standard of care causing a delay in the diagnosis of Simone's cancer. It was further anticipated she would testify that if an earlier diagnosis was made, Simone's cancer likely would have been at a less advanced stage with a better prognosis. Additionally, the Joneses listed five treating physicians as witnesses.

Dr. Savader's deposition was taken on January 18, 2012. She testified she would not provide an opinion concerning whether the delay in diagnosis caused Simone to suffer damages.

In March 2012, a formal pretrial order was filed requiring the Joneses to disclose all experts and their opinions by May 29, 2012. In their amended expert disclosures, the Joneses identified five treating physicians stating they were expected to testify regarding Simone's treatment and her pain and suffering experienced as a result of her cancer. However, there was no statement regarding their anticipated testimony regarding damages caused by a delay in Simone's diagnosis.

On August 1, 2012, Dr. Hart filed a second motion for summary judgment on the basis the Joneses had not produced an expert to support their allegation that the one-year delay in diagnosis caused additional injury and damage to Simone than would have occurred with an earlier diagnosis. In their response, the Joneses argued a genuine issue of material fact existed regarding whether the required medical opinions regarding causation could be presented in the future, specifically, by the treating physicians who “may or may not” ultimately provide the required causation testimony. In his affidavit submitted in response to Dr. Hart’s summary judgment motion, the Joneses’ counsel stated Dr. Savader’s refusal to testify regarding causation and damages was inconsistent with her statement made when he consulted with her prior to filing this action. It was further stated attempts to contact any of the five physicians had been unsuccessful. The circuit court granted Dr. Hart’s motion and the Joneses appealed.

The standard for granting a summary judgment in this Commonwealth is well known: Summary judgment is to be granted only when it appears impossible for the nonmoving party to prevail at trial. *Steelvest Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). Although summary judgment is cautiously granted, “[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial.” *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). When a summary

judgment is granted, our review is *de novo*. *Burton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474, 475 (Ky.App. 2010).

In a medical malpractice case, a plaintiff must present proof that a healthcare provider's allegedly negligent act was the proximate cause of the alleged injury. *Morris v. Hoffman*, 551 S.W.2d 8, 9 (Ky.App. 1977). “[T]he medical testimony must be that the causation is probable and not merely possible.” *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965). When expert testimony is required in a medical malpractice action to establish the plaintiff's claim and “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.” *Blankenship v. Collier*, 302 S.W.3d 665, 674 (Ky. 2010).

Dr. Hart contends medical testimony was required to establish a delay in diagnosis caused damages. The Joneses do not dispute expert testimony was required, but argue identification of five treating physicians in their expert disclosure was sufficient to defeat Dr. Hart's motion for summary judgment. Alternatively, the Joneses contend they should have been permitted additional time for discovery. We disagree.

“To survive a motion for summary judgment in a medical malpractice case in which a medical expert is required, the plaintiff must produce *expert evidence* or summary judgment is proper.” *Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky.App. 2006) (emphasis added). In response to Dr. Hart's motion for summary judgment,

it was incumbent upon the Joneses to submit an affirmative expert opinion that the delay in Simone's diagnosis caused damages. The mere speculation that a treating physician may or may not testify regarding causation does not create a genuine issue of material fact regarding causation.

The Joneses contend they should have been permitted additional time for discovery. Because it terminates the litigation, summary judgment should not be entered "as a form of penalty for failure to of the plaintiff to prove his case quickly enough." *Conley v. Hall*, 395 S.W.2d 575, 580 (Ky. 1965). Summary judgment is proper only 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, 841 (Ky.App. 2007).

When a party challenges a summary judgment as premature, this Court must "consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling." *Blankenship*, 302 S.W.3d at 668. However, the trial court's determination that a sufficient time was given will not be disturbed absent an abuse of discretion. *Id.*

The Joneses were surprised and undoubtedly disappointed by Dr. Savader's deposition testimony she would not offer an opinion regarding whether the delay in Simone's diagnosis caused her to suffer injury. However, seven months passed between the time of Dr. Savader's deposition and Dr. Hart's motion for summary judgment and over two years had elapsed since the complaint was filed. Despite this lapse of time, the Joneses did not present affirmative evidence to support their

medical malpractice claim. Although the treating physicians may have been unwilling to cooperate in the litigation, it was incumbent upon the Joneses to present affirmative expert opinion regarding the causation issue. As artfully stated in *Neal v. Welker*, 426 S.W.2d 476, 479-480 (Ky. 1968):

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.

We conclude the circuit court did not abuse its discretion when it determined the Joneses had ample time to complete discovery.

Based on the foregoing, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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