RENDERED: JULY 12, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001440-MR

JENNIFER DILL, INDIVIDUALLY
AND AS THE ADMINISTRATRIX
OF THE ESTATE OF JOSEPH
DOMINIC DILL, AND JOSEPH DILL,
INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE JOHN T. ALEXANDER, JUDGE
ACTION NO. 16-CI-00333

KEVIN FLOWERS, M.D.;
SOUTHEASTERN EMERGENCY
PHYSICIANS, LLC; T.J. SAMSON
COMMUNITY HOSPITAL;
UNKNOWN EMPLOYEES OR AGENTS
OF T.J. SAMSON COMMUNITY
HOSPITAL; AND UNKNOWN
CORPORATIONS OR ENTITIES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Jennifer Dill, individually and as the administratrix of the estate of Joseph Dominic Dill, and Joseph Dill, individually, ("the Dills") appeal from the Barren Circuit Court's denial of their Kentucky Rules of Civil Procedure (CR) 60.02 motion, which sought to set aside a summary judgment granted in a medical malpractice suit. Because the Dills failed to show they are entitled to the extraordinary relief afforded by CR 60.02(e), we affirm.

On July 14, 2016, the Dills filed suit against Kevin Flowers, M.D.; his practice group, Southeastern Emergency Physicians (SEP); T.J. Samson Community Hospital (Hospital); and unknown defendants. Their complaint alleged medical malpractice in connection with the death of their minor son, Joseph Dominic Dill (Dominic). Dominic was referred to the Hospital emergency room after complaining of hip pain. Dr. Flowers diagnosed him with a closed nondisplaced fracture of the head of his left femur, prescribed pain medications, and discharged him with instructions to follow up with an orthopedic physician. Three days later, Dominic passed away from an overdose of hydrocodone. The Dills alleged that Dominic had an undiagnosed infection with impaired kidney function which prevented him from metabolizing the hydrocodone.

After filing an answer to the complaint, Dr. Flowers served interrogatories, requests for production and requests for admissions on the Dills on

August 16, 2016. The requests for admissions sought information regarding experts who would support the malpractice claims; they stated as follows:

> 1. Please admit or deny that the Plaintiff did not consult with any qualified health care professional, prior to the filing of the instant action, to determine if the care provided by Defendant deviated from the accepted standard of care.
>
> 2. Please admit or deny that no qualified health care professional has criticized the care rendered by Defendant as having deviated from the accepted standard of care.
>
> 3. Please admit or deny that Plaintiff is unable to state through expert testimony that the care rendered by Defendant, to a reasonable degree of medical probability, caused the Plaintiff's or Decedent's claimed injuries.
>
> 4. Please admit or deny that the Plaintiff is unable to state through expert testimony that the care rendered by Defendant deviated from the accepted standard of care.

The Dills did not respond to any of the discovery requests nor ask for additional time to do so.

On October 12, 2016, Dr. Flowers moved to deem the requests for admissions admitted, relying on CR 36.01(2), which provides for automatic admission. As the Rule states, "[t]he matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting

the admission a written answer or objection addressed to the matter[.]" CR 36.01(2). The Dills did not file a response to this motion.

Ms. Dill appeared at motion hour on October 31, 2016, accompanied by her attorney. According to a notation on the DVD in the trial court record, this motion hour was not recorded because the "system was down." "[W]hen the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). According to the trial court's order and the appellees' statements of facts, Ms. Dill's attorney made an oral motion for leave to withdraw. He also requested additional time for the Dills to obtain new counsel and an extension of time to file responses to the requests for admissions. The trial court granted the motions and set the matter for motion hour on December 19, 2016. The trial court explained to Ms. Dill that she was being granted an extension of time to hire new counsel and respond to the requests for admissions and that if she failed to do so, the requests would be deemed admitted. The trial court also warned her that, if admitted, the admissions would likely provide a basis for dismissal of the case. The trial court entered an order reflecting its rulings, giving the Dills until December 19, 2016, fifty days, within which to obtain new counsel, have new counsel file an entry of appearance and to respond in

good faith to outstanding requests for admissions. The order also stated that the requests would be deemed admitted if the Dills did not comply by that date.

The Dills did not comply with any part of the order.

At motion hour on December 19, 2016, Ms. Dill claimed that she had spoken with a law firm on the phone and requested another extension of time. When the trial court asked her to explain the delay, she stated that she and her husband had been arrested on criminal assault charges relating to their son's death. The trial court explained to Ms. Dill that it had made an exception to the rules at the hearing of October 31 to provide her with more time to respond, but that now it had to enforce its order. The court cautioned that any summary judgment or dismissal had not yet been ruled on and would have to come as the result of a motion. The trial court ruled the admissions were now admitted by operation of law and entered an order to that effect.

On December 21, 2016, Dr. Flowers filed a motion for summary judgment. SEP and the Hospital also moved for summary judgment. As the basis for their motions, the defendants relied in part on the admissions that the Dills would not be able to produce expert proof that Dr. Flowers or the Hospital deviated from the applicable standard of care in treating Dominic.

A hearing on the motions was held on January 9, 2017. Ms. Dill was present at the hearing, without counsel. She informed the trial court that although

she had hired an attorney he could not be present due to a scheduling conflict. She explained that he had to attend court in Jamestown and "he said that as soon as that's over he's going to fly here, but it's probably an hour." She asked the court for an extension of time and to pass the hearing. No entry of appearance had been filed in the trial court record prior to the hearing, nor had the court received any communication from any attorney on the Dills' behalf. The trial court granted the defendants' motions for summary judgment and entered an order dismissing the Dills' claims with prejudice. The trial court also explained to the Dills they could retain counsel to assist with post-judgment proceedings.

No motion to vacate the judgment pursuant to CR 59.05 was filed.

Almost a month later, on February 8, 2017, an attorney representing Jennifer Dill filed an entry of appearance, a response, an objection to the defendants' motions for summary judgment and a motion to set aside the summary judgment and admissions pursuant to CR 60.02. Counsel also filed a notice of appeal. The appeal was subsequently dismissed by the appellants.

On February 27, 2017, the trial court held a hearing on the motion to set aside the judgment and admissions and entered an order allowing the parties additional time to file supplemental arguments and responses. A telephonic conference was held regarding the CR 60.02 motion. The trial court issued a second briefing schedule. On August 2, 2017, the trial court issued an order

denying the motion to set aside summary judgment pursuant to CR 60.02 (e) or (f). This appeal by the Dills followed.

On November 21, 2017, this Court entered an order limiting the scope of this appeal to the issues presented by the trial court's order of August 2, 2017, denying CR 60.02 relief. We will not consider the merits of the grant of summary judgment and dismissal, except insofar as they are pertinent to the denial of the CR 60.02 motion.

We review the denial of a CR 60.02 motion for an abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010), *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). Absent a "flagrant miscarriage of justice," we will affirm the trial court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

"CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). CR 60.02 was enacted as a statutory codification of the common law writ of *coram nobis* which was intended to address errors which "(1) had not been

heard or litigated, (2) were not known or could not have been known by the party through the exercise of due diligence, or (3) the party was prevented from presenting due to duress, fear, or some other sufficient cause." *Baze v. Commonwealth*, 276 S.W.3d 761, 765-66 (Ky. 2008) (citing *Gross*, 648 S.W.2d at 856).

Of particular significance for this case, we emphasize that CR 60.02 "is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal[.]" *McQueen*, 948 S.W.2d at 416 (internal quotation marks and citations omitted). Similarly, the failure to file a motion pursuant to CR 59.05 constitutes a knowing waiver of any arguments a litigant could have raised in such a motion and eliminates all justification for subsequently granting relief under CR 60.02. *Louisville Mall Associates, LP v. Wood Center Properties, LLC*, 361 S.W.3d 323, 336 (Ky. App. 2012) (citing *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898, 903 (Ky. App. 2009)).

The law regarding requests for admissions and the peril of failing to respond is well-established. *Buridi v. Leasing Group Pool II, LLC*, 447 S.W.3d 157, 174-75 (Ky. App. 2014).

> A proper request for admissions is often an effective tool in pretrial practice and procedure. Once a party has been served with a request for admissions, that request cannot simply be ignored with impunity. Pursuant to

> CR 36.01, the failure of a party to respond to such a request means that the party admits the truth of the allegations asserted. *See, Commonwealth of Ky. Dept. of Highways v. Compton*, Ky., 387 S.W.2d 314 (1964). Furthermore, any matter admitted under the rule is held to be *conclusively established* unless the trial court permits the withdrawal or amendment of the admissions. CR 36.02. Thus, an inattentive party served with a request for admissions may run the risk of having judgment entered against him based upon the failure to respond. *See, Lewis v. Kenady,* Ky., 894 S.W.2d 619 (1995).

Id. (quoting *Harris v. Stewart,* 981 S.W.2d 122, 124 (Ky. App. 1998)).

The Dills argue they are entitled to relief because their trial counsel was never afforded an opportunity to respond to the pending summary judgment motion prior to entry of the final order, and that counsel merely acted within his "sound professional discretion" in choosing not to enter his appearance for four weeks. They further claim that an entry of appearance would have been futile because the trial court stated that, even if counsel were present, it had already determined the case must be dismissed on the basis of the admissions.

This argument is without merit. Even if trial counsel in his professional judgment believed he did not have sufficient time to respond substantively to the motions for summary judgment, he provides no reason why he could not have notified the trial court of the new representation and requested a continuance. Any arguments counsel wished to raise regarding the substantive effect of the admissions could have been raised in a timely motion pursuant to CR

59.05 to alter, amend or vacate the judgment. No motion was filed. Such failure constitutes a knowing waiver of those arguments. *Louisville Mall Associates*, *supra*.

The Dills' counsel did file a notice of appeal from the summary judgment which was voluntarily dismissed. Any issues which could have been raised in that direct appeal are also waived, in keeping with the principle of not using CR 60.02 to litigate issues which could have been raised in an earlier proceeding. *Gross*, 648 S.W.2d at 855-56.

The Dills argue that the denial of their CR 60.02(f) motion was improper because the trial court did not explain its reasoning, failed to specify whether the motion was denied for failure to prosecute under CR 41.02 or summary judgment under CR 56.03, and failed to make explicit findings or to consider the totality of the circumstances. Because these are claims which could have been raised in a motion for additional findings pursuant to CR 52.04, a motion to alter, amend or vacate, or on direct appeal, they will not be considered here.

The Dills argue that they have shown the extraordinary circumstances to justify relief pursuant to CR 60.02 because the trial court ignored the fact there was a legitimate dispute regarding the need for an expert medical witness and did not issue any separate orders requiring the same. The Dills contend it was clear to

any lay person that Dr. Flowers and the Hospital staff were negligent in their care of Dominic. This argument concerning the existence of a legitimate dispute about the need for an expert medical witness relates directly to the merits of the summary judgment motion and could have been raised via CR 59.05 and subsequently on direct appeal. It is not suitable for resolution pursuant to CR 60.02. Similarly, their related arguments, that the trial court never set an expert disclosure deadline under local circuit court rules; never issued a separate ruling on the issue of the need for expert testimony; never determined whether an expert was required and never provided the Dills with a reasonable amount of time to identify such an expert, all could have been raised on direct appeal.

They also contend it was the duty of the trial court to inform Ms. Dill that she required an expert medical witness to proceed with litigation and only informed her of this fact on the day it dismissed the case. This claim is clearly refuted by the record. The trial court made Ms. Dill aware of the need to respond to the requests for admissions and the potential for the dismissal of the case at the October 31, 2016 hearing. It warned her again of the impending danger of dismissal at the December 19, 2016 hearing. The trial court did not prejudge the case, as the appellants argue, but merely enforced its order after affording the appellants lengthy extensions of time within which to retain counsel. Furthermore, at no time did the Dills attempt to withdraw the admissions once they were entered,

although CR 36.02 expressly permits a trial court to allow "withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." CR 36.02.

The Dills also argue that granting CR 60.02 relief and setting aside the admissions would be equitable to all parties because the appellees were simply trying to win the case on a technicality and no evidence or witnesses have been lost and no depositions taken. But any delays and lack of prosecution in this case were due solely to the dilatoriness of the Dills. It would be highly inequitable to allow the Dills to use the delay they created as a basis for claiming the appellees have not been prejudiced.

The Dills contend that the trial court had no jurisdiction over their current counsel and counsel had no obligations to the trial court because he only entered an appearance a month after the summary judgment hearing. Thus, they claim any alleged misconduct by trial counsel should not form the basis of the denial of the CR 60.02 motion. This argument is without merit. As the trial court correctly observed, any negligence or wrongdoing on the part of an attorney is imputable to the client and in any event is not the basis for relief under CR 60.02. "Negligence of an attorney is imputable to the client and is not a ground for relief

under CR 59.01(c) or CR 60.02(a) or (f)." *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797, 799 (Ky. App. 1984). Furthermore, Ms. Dill was provided with ample notice regarding the consequences of her inaction in obtaining replacement counsel on the numerous occasions she appeared before the court.

The Dills further contend that the trial court prejudged their case, resulting in manifest injustice. They argue that because Ms. Dill was not provided the opportunity to retain new counsel, she was deprived of her right to due process. Due process does not mean that a party must be afforded limitless extensions of deadlines and be allowed to ignore the Rules of Civil Procedure. It is well-settled that a "party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). The trial court gave the Dills multiple opportunities and extensions of time in which to respond to the requests for admissions. Their due process rights were not violated because they failed to take advantage of these opportunities.

The appellants also argue that the need for expert testimony was legitimately disputed by Ms. Dill from the outset of the case and the trial court should have made a separate ruling on the issue before setting an expert disclosure deadline. *See Blankenship v. Collier*, 302 S.W.3d 665, 672-73 (Ky. 2010).

This argument could have been raised in prior proceedings and is therefore not properly before us. In any event, the Dills failed to create a legitimate dispute about the need for an expert witness by refusing to respond to the requests for admissions in a timely manner.

For the foregoing reasons, the Barren Circuit Court's order denying the Dills' CR 60.02 motion to set aside the summary judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Larry Forman
Louisville, Kentucky

BRIEF FOR APPELLEES KEVIN FLOWERS, M.D. AND SOUTHEASTERN EMERGENCY PHYSICIANS LLC:

Mark E. Nichols
Carl W. Walter II
Sarah C. Clark
Lexington, Kentucky

Melanie Marrs
David Trevey
Lexington, Kentucky

BRIEF FOR APPELLEE T.J. SAMSON COMMUNITY HOSPITAL:

Patricia C. LeMeur
Susan D. Phillips
M. David Thompson
Louisville, Kentucky