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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000029-MR

BRENDA L. PRINGLE
AND THOMAS D. PRINGLE APPELLANTS

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE JOHN T. ALEXANDER, JUDGE
ACTION NO. 14-CI-00310

CHRISTY SOUTH, M.D. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CALDWELL, AND KRAMER, JUDGES.

CALDWELL, JUDGE: Appellants, Brenda L. Pringle and Thomas D. Pringle, appeal the Barren Circuit Court's dismissal of Brenda's medical malpractice claim and Thomas's loss of consortium claim for failure to identify an expert witness who could establish the applicable standard of care.[1] We affirm.

[1] While this appeal concerns claims from both appellants, since the loss of consortium claim is derivative of the malpractice claim, all references will be to Brenda and her claim.

FACTS AND PROCEDURAL BACKGROUND

Brenda Pringle retained the services of Appellee, Christy South, M.D., in May of 2013, for treatment of abdominal pain which led to a surgery performed by Dr. South to remove pelvic cysts and a mass. Brenda did not recover well after the surgery and additional surgical procedures were undertaken until she was finally released to return to work in September of 2013. In June 2014, Brenda filed a medical negligence action against Dr. South alleging the doctor's breach of the standard of care caused her protracted recovery and consequential damages.

Discovery commenced, and in February of 2017, Brenda filed a CR[2] 26.02 compliance disclosure identifying medical experts who would testify. Dr. South deposed each physician identified save one, Elvis S. Donaldson, M.D. Each deposed physician was a treating physician, and none testified that he believed Dr. South had provided care which fell below what they considered the applicable standard of care.

Dr. Donaldson, despite being subpoenaed, did not give his deposition. Dr. Donaldson was a contractor-consultant for the Kentucky Board of Medical Licensure who reviewed allegations Brenda brought against Dr. South before that agency.

[2] Kentucky Rules of Civil Procedure.

The Board is charged by statute with regulating the practice of medicine in the Commonwealth. As a part of that charge, the Board reviews patients' complaints of substandard medical care against physicians and other medical professionals. KRS[3] 311.591; 201 KAR[4] 9:240 Section 5(5)(a), (b). In evaluating such claims, that agency regularly engages independent physicians to render opinions after reviewing materials in a case. Such was Dr. Donaldson's involvement in this matter. Brenda did not hire Dr. Donaldson, nor does he appear from the record to have been engaged by her to provide expert testimony.

The Board filed a motion to quash the subpoena served on Dr. Donaldson. The Board argued that Dr. Donaldson agreed to act, as part of its function, as the regulator of the medical profession, that he was compensated for his time spent on Brenda's complaint to the Board at a reduced fee, and that allowing such contractors to be lassoed into associated court actions would have a chilling effect on the willingness of physicians to provide this service. This would have a deleterious effect upon the standard of medical care provided citizens in the Commonwealth and would hamper the Board's ability to provide its much needed and most important function.

[3] Kentucky Revised Statutes.

[4] Kentucky Administrative Regulations.

The trial court granted the motion to quash in September of 2018, long after the time for the identification of witnesses ended. Soon thereafter, Dr. South filed a motion for summary judgment arguing that Brenda could not prove her case, having identified no expert who would testify regarding the applicable standard of care and that Dr. South breached it. The trial court entered summary judgment. This appeal followed.

STANDARD OF REVIEW

The Kentucky Supreme Court has stated:

> In a medical malpractice action, where a sufficient amount of time has expired and the plaintiff has still "failed to introduce evidence sufficient to establish the respective applicable standard of care," then the defendants are entitled to summary judgment as a matter of law. *Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d 781, 784 (Ky. App. 2007); *See also Neal v. Welker*, 426 S.W.2d 476, 479-480 (Ky. 1968). The trial court's determination that a sufficient amount of time has passed and that it can properly take up the summary judgment motion for a ruling is reviewed for an abuse of discretion.

Blankenship v. Collier, 302 S.W.3d 665, 668 (Ky. 2010).

ANALYSIS

Brenda does not argue that the four-year period between filing her complaint and responding to the summary judgment motion was not enough time to procure the testimony of an appropriate expert. Therefore, we need not question the trial court's exercise of discretion by implicitly determining sufficient time had

passed before entering judgment. We turn to our *de novo* review of the decision to grant the summary judgment motion. "We review the trial court's issuance of summary judgment de novo, and any factual findings will be upheld if supported by substantial evidence and not clearly erroneous." *The Board of Regents of Northern Kentucky University v. Weickgenannt*, 485 S.W.3d 299, 307 (Ky. 2016) (citation omitted).

Except in cases governed by the doctrine of *res ipsa loquiter*, a party claiming medical negligence must present expert testimony regarding the standard of care and how it was breached. *Blankenship*, 302 S.W.3d at 670; *Perkins v. Hausladen*, 828 S.W.2d 652, 655-56 (Ky. 1992). "[I]n medical malpractice cases, expert testimony is always used to show the standard of care for a particular type of practice and procedure." *Hamby v. University of Kentucky Medical Center*, 844 S.W.2d 431, 434 (Ky. App. 1992). Tellingly, Brenda has not argued that her case falls within the purview of *res ipsa loquitur*, and rather, argued in response to the motion for summary judgment that she intended to present the testimony of Dr. Donaldson, despite the trial court granting the motion to quash.

Although the "order quashing a discovery subpoena . . . could be reviewed on appeal[,]" *Inverultra, S.A. v. Wilson*, 449 S.W.3d 339, 346 (Ky. 2014), Brenda did not appeal the order to quash the subpoena propounded on Dr. Donaldson. Her entreaty in her response to the summary judgment motion that the

order quashing be "revisited" did not change the trial court's ruling. This Court must therefore presume the propriety of the trial court's order quashing the subpoena.

Brenda's only argument is that she is "legally permitted to present into evidence at the trial of this case the investigations, findings, conclusions and report of Dr. Donaldson concerning the level of care [Dr. South] provided . . . ." (Appellants' brief, p. 6). The trial court erred, says Brenda, by determining that "because Dr. Donaldson had not been ***retained*** by [Brenda] as an expert witness in this case he cannot be compelled by [her] to testify as an expert." *Id.* She now claims her disclosure of Dr. Donaldson as an expert witness should be sufficient to defeat the summary judgment motion and that Dr. Donaldson's work product for the Board regarding Dr. South's care and treatment of Brenda will show that said care and treatment fell below the standard of care.

While Kentucky lacks precedent directly on point, our analysis in the unpublished case of *Fryman v. Wiczkowski*, No. 2011-CA-001042-MR, 2012 WL 6061727 (Ky. App. Dec. 7, 2012),[5] and its reliance on a case from New Jersey's highest court is appropriate here.

> [A]ll knowledge which one has of the actual facts of a litigation, whether the witnesses to those facts be

[5] We do not cite *Fryman* as precedent. However, because there is no published opinion that adequately addresses the issue, it is citable pursuant to CR 76.28(4)(c). It is persuasive, and its citation demonstrates a consistency in this Court's opinions.

> professional or lay, is available and such witnesses thereof amenable to subpoena and compellable to give evidence of such facts. On the other hand, *when the experience, training, and skill acquired by years of study and practice in a given profession or calling exists, such knowledge and skill are not the property of litigants*. It belongs to the professional man in his chosen occupation. *Neither justice nor public policy in our view forbids that the expert shall retain such knowledge and skill free from divulgement except by his voluntary acquiescence*, whether it be sought for compensation in the exercise of his skill, in the expression of his professional judgment privately, or when he is called for that purpose into a court of justice.

Id. at *6 (emphasis added) (quoting *Stanton v. Rushmore*, 169 A. 721, 721 (N.J. 1934)).

It is undisputed that Dr. Donaldson reviewed aspects of Dr. South's practice. However, he did so in the context of his contractual work for the Board of Medical Licensure pursuant to KRS 311.595 and 311.597. The Board relied on Dr. Donaldson to assist it in determining whether to take action against Dr. South's medical license. He was not creating a repository of evidence from which claimants may draw. Brenda cannot even compel evidence from Dr. Donaldson if it amounts to his "[p]reliminary recommendations, and preliminary memoranda in which [his] opinions are expressed" for use by the Board. KRS 61.878(1)(j) (setting out exceptions to the Open Records Act).

The effect of the trial court's ruling is that a party to a medical negligence action cannot compel involuntary expert testimony from a physician or

other medical professional whose expert opinion, if any, is the product of his or her work for the Kentucky Board of Medical Licensure pursuant to KRS 311.591 and 201 KAR 9:240 Section 5(5)(a) and (b). There are substantial reasons for so ruling, as described above. Additionally, a different decision would encourage plaintiffs to avoid the cost and inconvenience of finding their own independent medical experts by lodging a complaint with the Board and subpoenaing the investigative physician who is under contract with the board. We agree with the sound reasoning of the trial court and hold that civil plaintiffs are not entitled to compel the Board's physician to act as an involuntary expert witness in their private civil action claim of medical negligence.

In the case before the Court, Brenda failed to identify an expert witness not under contract to the Kentucky Board of Medical Licensure who was willing to provide the necessary testimony to establish the applicable standard of care and that Dr. South breached that standard. The trial court properly granted the motion for summary judgment in favor of Dr. South as to Brenda's claim of medical negligence.

For the foregoing reasons, the Barren Circuit Court's summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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