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RENDERED: MARCH 18, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000389-DG
AND
2008-SC-000133-DG

FINAL

DATE 4-8-10 Kelly Klauer S.C.

APPELLANTS/CROSS-APPELLEES

ROBERT SOLINGER, M.D.;
CHRISTOPHER JOHNSRUDE, M.D.;
MICHAEL RECTO, M.D.; AND
PEDIATRIC CARDIOLOGY ASSOCIATES,
P.S.C.

ON REVIEW FROM COURT OF APPEALS

V.

CASE NO. 2006-CA-000585

JEFFERSON CIRCUIT COURT NO. 05-CI-002182

MELANIE PEARSON AND
NORTON HOSPITAL, INC.

APPELLEES/CROSS-APPELLANTS

AND

2007-SC-000414-DG
AND
2008-SC-000134-DG

NORTON HOSPITAL, INC.

APPELLANT/CROSS-APPELLEE

ON REVIEW FROM COURT OF APPEALS

V.

CASE NO. 2006-CA-000585

JEFFERSON CIRCUIT COURT NO. 05-CI-002182

MELANIE PEARSON

APPELLEE/CROSS-APPELLANT

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This Court is again presented with the question of when a trial court may grant summary judgment against a plaintiff who fails to identify any expert witnesses in a medical malpractice action. Faced with this same issue in *Blankenship v. Collier*, --- S.W.3d --- (Ky. 2009), this Court held that because Collier, the plaintiff, had acknowledged the need for expert testimony for more than a year and because it was clearly unreasonable on the record before the trial court to conclude that he did not need expert testimony in his medical malpractice action, the trial court properly granted the defendants' motions for summary judgment after Collier continually failed to identify any expert witnesses. Here, Melanie Pearson also did not dispute the need for expert witnesses in her medical malpractice action, and given the nature of her claims, it would have been unreasonable for her to do so. Nonetheless, on the particular facts of this case, this Court finds that the trial court acted prematurely in taking up the defendants' summary judgment motions for ruling without first determining the status of Pearson's efforts to fund the unnamed experts she claimed would support her case. Therefore, the Court of Appeals' opinion reversing the trial court's grant of summary judgment is affirmed on different grounds.

RELEVANT FACTS

On March 7, 2005, Melanie Pearson, proceeding *pro se*, filed a medical malpractice action against Dr. Solinger, Dr. Johnsrude, Dr. Recto, Pediatric

Cardiology Associates, and Norton Hospital (the defendants). In her complaint, Pearson explained that she had been receiving treatment from the defendants for several years for her numerous heart-related medical conditions. Pearson alleged that in May 2003, her heart defects reached a severe and dangerous state, but that the defendants failed to take the appropriate action, causing her to develop dilatation of her heart, left atrium and left ventricle, and a chronic pleural effusion of her left lower lung. In addition, Pearson alleged that she developed atrial fibrillation as a result of the defendants' inaction, and on February 18, 2004, had to be admitted to Norton Hospital for emergency treatment. Pearson claimed that while being treated for this atrial fibrillation, the physician-defendants prescribed Coumadin, an anticoagulation drug, in an excessive dose, which caused her to develop a cerebral aneurysm; to suffer from damage to her heart, lungs, brain, and central nervous system; and to experience emotional distress.

In response to Pearson's complaint, the physicians and Norton Hospital filed separate motions to dismiss based on Pearson's failure to comply with the statute of limitations. After the trial court denied the defendants' motions to dismiss, the defendants served requests for admissions and a set of interrogatories, asking that Pearson disclose the name of any anticipated expert who would support Pearson's claim that her physicians deviated from the proper standard of care.¹ On April 25, 2005, Pearson filed a motion with

¹ Norton Hospital served its first set of interrogatories on March 22, 2005, while the physicians served theirs on April 20, 2005.

the court requesting that she be given a twenty-day extension from April 25 till May 15, 2005, to respond to the defendants' discovery requests, which the trial court granted. On May 16, 2005, Pearson filed another request for an extension to respond. Before the trial court ruled on Pearson's second motion for an extension, the defendants filed separate motions for summary judgment, Norton Hospital filing its motion on May 20, 2005, and the physicians filing their motion on May 23, 2005.

The physicians argued that they were entitled to summary judgment because Pearson's failure to respond to their request for admissions constituted a judicial admission that they never deviated from the appropriate medical standard of care. In Norton Hospital's motion for summary judgment, in addition to presenting the judicial admission argument, Norton also contended that because Pearson had failed to produce an expert witness as required by law, she could not establish that the hospital had deviated from the accepted standard of care. Neither of the defendants' summary judgment motions acknowledged that Pearson had filed a motion for an extension of time to respond to their requests for admissions and interrogatories. Subsequently, on June 6, 2005, the trial court granted Pearson's motion for an extension of time, giving her until June 30, 2005 to submit her response to the defendants' discovery requests.

On June 13, 2005, Pearson requested a seven-day extension to respond to the defendants' motions for summary judgment, which the trial court granted. On June 20, 2005, Pearson filed her response to the defendants'

motions, arguing primarily that summary judgment was improper because she was not yet required to respond to the defendants' discovery requests given the trial court's extension of her deadline to June 30, 2005. Regarding Norton's allegation that Pearson had no expert witnesses, Pearson requested "that the defendants' motion not be ruled on and that this matter be continued until the Plaintiff has an opportunity to conduct fact discovery and obtain Affidavits or Depositions from her expert witnesses." Pearson also stated that "[m]oreover, contrary to the defendants' speculation that the plaintiff cannot support her claim with expert medical testimony, the plaintiff has retained a medical expert which (*sic*) supports her contentions in this matter, is attempting to obtain additional medical experts and will be relying upon the medical records from Defendant Norton Hospital" The trial court did not enter a ruling on the defendants' motions for summary judgment following Pearson's response. On July 7, 2005, Pearson submitted her response to the defendants' discovery requests.

On July 27, 2005, the trial court entered a civil jury trial order, setting the trial for April 25, 2006 (a date approximately fourteen months after the filing of the complaint), and requiring Pearson to identify her expert witnesses by October 1, 2005. During the next several months, the parties continued to engage in discovery and in taking depositions. They appeared for a status conference on September 6, 2005 and the trial court informed Pearson that if her health problems prevented her from attending any future court appearance

she should call and advise the court. The video record reflects the trial judge assuring Pearson that “nothing would happen” in her absence.

On October 1, 2005, Pearson filed a motion requesting that the court extend her expert disclosure deadline by sixty days. Pearson explained that she suffered from financial hardship and that she would be unable to obtain the funds needed to secure expert witnesses and their reports until the end of October or early November. On October 11, 2005, the trial court granted Pearson’s request and gave her to December 1, 2005, to disclose her experts. On December 7, 2005, having received no expert disclosure from Pearson, Norton Hospital filed a motion requesting that the court rule on its prior motion for summary judgment, relying on its prior memorandum and on the fact that Pearson still had not disclosed any expert witnesses and had not requested another extension of time from the court.²

On December 9, 2005, the trial court conducted its previously scheduled status conference. As Pearson subsequently explained in a February 20, 2006 affidavit, she had planned on attending the status conference and requesting an additional enlargement of time to disclose her hired expert witnesses because she had still been unable to obtain the necessary funds to retain them. However, on the morning of December 9, 2005, Pearson was hospitalized with severe chest pain. Pearson’s fiancée called the trial court at approximately 8:25 a.m. that morning and informed the clerk that Pearson

² The physician-defendants also filed a separate motion on December 12, 2005, requesting that the trial court rule on its prior motion for summary judgment.

would be unable to attend the status conference because of her hospitalization and requested that the court grant Pearson a continuance. Pearson contends that the clerk advised her fiancée that the court would notify Pearson of a future date once it had been determined.

At 8:34 a.m. on December 9, 2005, the trial court began its status conference by acknowledging that Pearson was in the hospital and would be unable to attend the proceeding. Because of Pearson's absence, counsel for the defendant-physicians also did not attend the status conference, leaving only the trial judge and counsel for Norton Hospital. After noting Pearson's absence, the trial judge stated that she had received Norton Hospital's motion requesting that the court rule on its previously filed motion for summary judgment. The trial judge confirmed that this motion was based on Pearson's "inability to comply with the expert disclosure deadline which has been passed once." After clarifying that the summary judgment motion was originally filed in late spring, the trial court informed Norton Hospital that it would enter a ruling on the motion within the week "not because Ms. Pearson is not here . . . but because it's appropriate for the court to rule on it." This status conference lasted approximately two minutes.

Three days later, on December 12, 2005, the trial court entered its order granting the defendants' motions for summary judgment. The trial court held that Pearson would be

unable to sustain her burden of proof against any of the Defendants without competent expert testimony. Plaintiff has not complied with the Trial Order as she has not identified any experts, nor supplied CR 26.02

information. As such, there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law.

On December 14, 2005, Pearson filed a letter with the court explaining that her hospitalization had prevented her from attending the status conference and that her case should not be dismissed for lack of expert testimony. Pearson asserted that the defendants could not have suffered prejudice from her being only a couple of weeks late in disclosing her experts, that the court had only extended her expert disclosure deadline once, and that “a case that is set for trial in late April 2006 . . . can tolerate a delay caused by financial hardship [as opposed to a delay caused by a] disregard for the Court’s Orders or the Civil Rules.” Although Pearson did not explicitly ask for a time extension in this letter, she did state that “the Court has inherent authority to enlarge the time period for Plaintiff’s expert disclosure pursuant to [a] proper request made by Plaintiff.” Pearson’s letter did not mention the trial court’s order entered two days earlier granting summary judgment for the defendants, apparently because she was unaware of its existence.

On December 22, 2005, Pearson filed a *pro se* motion to vacate the trial court’s grant of summary judgment. Pearson argued that genuine issues of material fact still existed in her case and that the trial court erred by failing to reschedule the December 9, 2005 status conference, which she was unable to attend; setting discovery deadlines that were inconsistent with Jefferson Rule of Practice 7.07; failing to hold a hearing on the defendants’ renewed summary judgment motions; and finding that the defendants had met their burden

under the summary judgment standard. Shortly after filing this motion, Pearson hired an attorney, and on January 17, 2006, requested leave from the trial court to file her expert witness disclosures. The defendants filed responses to Pearson's motion to vacate, and Pearson submitted a reply. After the trial court held a hearing on this motion, it entered an order denying Pearson's motion to vacate on February 24, 2006. The trial court held that at the time Pearson filed her motion to vacate, no material issues of fact existed because she had no expert witnesses who could support her claim of medical malpractice. The court also noted that Pearson's recent motion to file an expert witness disclosure was submitted "some 36 days after final judgment was entered" and was irrelevant to her current motion to vacate.

Pearson appealed the trial court's grant of summary judgment to the Kentucky Court of Appeals. Although the Court of Appeals agreed that Pearson's medical malpractice action was not a *res ipsa loquitur* case and that she was required to produce expert witnesses to sustain her burden of proof, the court concluded that the trial court abused its discretion by prematurely granting summary judgment. The Court of Appeals noted that Pearson had not ignored the trial court's orders or refused to obtain an expert. Rather, she had attempted "to secure experts but was impeded by her illnesses, hospitalizations, and lack of funds." Ultimately, the Court of Appeals found that because the defendants "did not aver it was impossible for Pearson to obtain expert testimony," they failed to establish the non-existence of a genuine issue of material fact and were not entitled to summary judgment. The Court

of Appeals also criticized the trial court for using a summary judgment motion as a “sanctioning” tool to punish Pearson for failing to meet its disclosure deadline.

This Court granted the physicians’ and Norton Hospital’s petitions for discretionary review. Subsequently, this Court also granted Pearson’s cross-motions for discretionary review, which raised the following issues: whether, for summary judgment purposes, the drug manufacturer’s package inserts for Coumadin provided the applicable standard of care without the need for expert testimony; whether Norton Hospital had a duty to track Pearson’s drug interactions; whether Norton Hospital and the physicians failed to warn Pearson of the risk of cerebral bleeding in violation of Kentucky’s Informed Consent Statute, KRS 304.40-320; whether Pearson’s failure to disclose expert witnesses was properly raised as a ground for entry of summary judgment; and whether Pearson was given an adequate opportunity to be heard on the defendants’ renewed summary judgment motions due to the trial court’s failure to reschedule the December 9th status conference. Having considered the record in this case, this Court finds that the trial court acted prematurely in deciding to rule on the defendants’ summary judgment motions without first either rescheduling the status conference or otherwise notifying Pearson of its decision to rule on the defendants’ pending motions. Because the case is being

remanded, several of Pearson's cross-motion issues are now moot and will not be addressed.³

ANALYSIS

On appeal, Norton Hospital and the physician-defendants argue that the Court of Appeals erred in applying a summary judgment standard that required them to demonstrate that it was impossible for Pearson to obtain an expert witness, and in concluding that the trial court improperly used a summary judgment as a sanction for Pearson's failure to meet a court deadline. The defendants also contend that the trial court did not err in finding that Pearson could not sustain her burden of proof without expert testimony and in granting their motions for summary judgment. Although this Court agrees with the defendants that the Court of Appeals applied the wrong summary judgment standard and that the trial court did not use the summary judgment as a sanction, we nonetheless find that the trial court acted prematurely and abused its discretion in deciding to rule on the defendants' summary judgment motions at a time when it had not rescheduled the status conference or informed Pearson of its intention to enter a ruling.

I. A Party Moving for Summary Judgment Must Demonstrate That There Are No Genuine Issues of Material Fact In The Record and Is Not Required to Prove That It Would Be Impossible For the Non-Moving Party to Ever Secure An Expert.

The Court of Appeals stated in its opinion that

³ It also appears that Pearson's arguments that she should have been allowed to proceed on certain claims without experts were never timely presented to the trial court and thus were never preserved.

[t]he doctors and Norton Hospital had the burden of demonstrating the non-existence of a genuine issue of material fact. *See Barton, [v. Gas Service Co.]*, 423 S.W.2d 902. The appellees moved for summary judgment on Pearson's failing to make her expert witness disclosures and did not aver it was impossible for Pearson to obtain expert testimony.

The Court of Appeals then concluded that the defendants did not meet their burden of demonstrating the non-existence of any genuine issue of material fact and that the trial court entered summary judgment prematurely. Although this Court ultimately agrees that the trial court acted prematurely in granting this motion, we disagree that a defendant moving for summary judgment based on a plaintiff's failure to disclose necessary medical experts needs to demonstrate that it would be impossible for the plaintiff to obtain expert testimony.⁴

This Court has held that when ruling on a summary judgment motion, a trial court should consider "whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch v. American Pub. Co. of Ky.*, 3 S.W.3d 724, 730 (Ky. 1999). In applying this rule to the facts at hand, the trial court should have considered whether Pearson had submitted any expert witness disclosures at the time the summary judgment motion was filed, and not whether she would

⁴ It is unclear how a defendant could ever state in good faith that it would be "impossible" for the plaintiff to obtain expert testimony. Impossibility suggests that every possible expert in the relevant field of expertise has declined, or would decline, to offer the necessary testimony.

have been capable of ever obtaining an expert witness at some point prior to trial. Thus, despite the Court of Appeals' statement, the defendants in this case were not required to prove that it would have been impossible for Pearson ever to obtain a medical expert. Rather, they simply needed to show that Pearson could not meet her burden of proof without medical expert testimony and that at the time the summary judgment motion was filed, Pearson had completely failed to make any expert witness disclosures. Although a more thorough discussion of summary judgments based on a failure to disclose medical experts follows *infra*, this Court initially notes that the Court of Appeals' statement regarding a defendant's burden for this type of summary judgment is inaccurate.

II. Because The Summary Judgment Motion In This Instance Was Based on an Actual Failure of Proof and Not Simply a Failure to Meet a Deadline, The Defendants Had Proper Grounds On Which To File A Motion For Summary Judgment.

Pursuant to Kentucky law, in a medical malpractice action where expert witnesses are required, a defendant may be entitled to summary judgment if the plaintiff fails to identify any expert witnesses within a reasonable amount of time. *See Blankenship and Caritas Health Services, Inc. v. Collier*, --- S.W.3d --- (Ky. January 21, 2010) (“[i]n 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,” *quoting Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d 781, 784 (Ky.

App. 2007)); *Neal v. Welker*, 426 S.W.2d 476, 479-480 (Ky. 1968) (holding that “the curtain must fall at some time upon the right of a litigant” to put forth the most basic level of proof and that the plaintiff’s bare assertion “that something will ‘turn up’ cannot be made basis for showing that a genuine issue as to a material fact exists”); *Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d at 784 (holding that the trial court properly granted summary judgment for the defendant doctor because the plaintiff, by not identifying any expert witnesses, “failed to introduce evidence sufficient to establish the respective applicable standard of care”); *Ward v. Housman*, 809 S.W.2d 717, 719 (Ky. App. 1991) (implying that summary judgment is appropriate in medical malpractice cases where the dismissed party had no medical experts). Kentucky courts have also been clear, however, that it is not appropriate for trial courts to use a summary judgment motion for punitive reasons to sanction parties for making untimely expert witness disclosures. *Ward*, 809 S.W.2d at 719. Although this distinction is pertinent, the fact remains that when the motion is based on an actual failure of proof due to a complete lack of expert testimony, and not on a failure to meet a deadline due to an untimely disclosure, summary judgment can be appropriate. Ultimately, it is within a trial court’s sound discretion to determine the point at which a plaintiff’s failure to identify the necessary expert witnesses amounts to a failure of proof.⁵

⁵ Although a trial court has the discretion to determine when a summary judgment motion is properly before it and ready for a ruling, *i.e.*, when a sufficient amount of time has passed to allow the opposing party an ample opportunity to complete discovery and respond to the motion, *see Pendleton Bros. Vending, Inc. v. Com. Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988), the trial court’s actual

Here, Norton Hospital and the physicians moved for summary judgment because Pearson's failure to identify any medical experts indicated that she would not be able to sustain her burden of proving medical negligence. This situation is different from the summary judgment used as a sanctioning tool in *Ward v. Housman, supra*. The plaintiff in *Ward* disclosed her expert witness nine months after the trial court's disclosure deadline had expired. *Id.* After the plaintiff's untimely disclosure, the defendants moved to exclude the expert because the disclosure had occurred well-after the deadline, and, in the alternative, moved for a continuance because Ward's witness was "a surprise" expert. *Id.* The trial court granted the defendant's motion to exclude, even though the plaintiff argued that she would be unable to meet her burden of proof without the expert witness. *Id.* After the court refused to reconsider its ruling excluding the plaintiff's expert witness, it also granted the defendant summary judgment even though there was *no* pending motion for summary judgment. *Id.* at 719 ("The result [the defendant] got was more than what he asked for").

The Kentucky Court of Appeals explained that on appeal, the central issue was whether "it was proper for the trial court to strike indispensable witnesses merely because plaintiffs' counsel failed to comply with the court's schedule." *Id.* The Court noted that

determination regarding whether a genuine issue of material fact exists in the record is not discretionary and is reviewed by an appellate court under the *de novo* standard. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 445 (Ky. 2005).

[t]he dismissal of the Wards' cause of action was by summary judgment pursuant to CR 56. In applying CR 56.02 the trial court necessarily concluded that there was no genuine issue of material fact and that Housman was entitled to judgment on the facts as a matter of law. In reality, however, the case was dismissed for Wards' counsel's failure to timely supply the name of an expert witness. The dismissal by summary judgment for this reason causes us concern.

Id. The Court of Appeals thus concluded that the trial court had entered summary judgment against a plaintiff who had secured an expert and had disclosed his identity, *albeit* in an untimely manner. It is this factual distinction that separates Pearson's case from *Ward*: Pearson's case was not dismissed for an untimely expert disclosure, but rather for a complete lack of an expert disclosure. As we held in *Blankenship v. Collier*, summary judgment motion based on a complete lack of an expert disclosure, (following the passage of a reasonable period of time) is proper because it is based on the plaintiff's failure of proof, not the plaintiff's inability to meet a deadline. When it is evident that a plaintiff has had sufficient time but cannot secure any expert witnesses to prove medical negligence, then a genuine failure of proof exists and a defendant is justified in filing a summary judgment motion.

Upon a proper summary judgment motion from the defendant, it is incumbent upon the trial court to ensure that the plaintiff has had a reasonable amount of time to identify expert witnesses and to respond to the defendant's summary judgment motion before making a ruling. What constitutes a reasonable amount of time will vary depending upon the complexities of the case and other factors so there is no hard-and-fast rule, but

rather a need to examine carefully the relevant circumstances in each case. If a reasonable amount of time expires and the plaintiff has still failed to file any expert disclosures or request an extension of time, the trial court has the discretion to “let the curtain fall” on a plaintiff’s claim by granting summary judgment for the defendants. *See Neal*, 426 S.W.2d at 479-480.

III. The Trial Court Should Have Rescheduled the Status Conference or Notified Pearson of its Intent to Rule and Determined the Status of Her Efforts to Fund Her Expert Witness Before Entering Summary Judgment.

In her brief before this Court, Pearson contends that the trial court abused its discretion in taking up the defendants’ summary judgment motions and entering its ruling before the court had continued the December 9th status conference, which Pearson could not attend due to her hospitalization. Although the defendants had grounds on which to file their summary judgment motions, we nonetheless agree with Pearson that the trial court abused its discretion when it decided to take up and rule on the summary judgment motion. The trial court did not reschedule the December 9 status conference after Pearson was unable to attend due to a sudden hospitalization and did not otherwise inform Pearson of its decision to rule promptly on the pending motions. The morning of the status conference, Pearson informed the court clerk of her inability to attend, as she had been previously directed to do by the trial court, and understandably assumed, given the trial court’s assurances on September 6, 2005, that nothing of significance would happen in her case until the status conference was rescheduled. However, it was at this status conference, which neither Pearson nor counsel for the defendant-physicians

attended, that the trial court agreed to rule on Norton Hospital's summary judgment motion within the week. Three days after the status conference, before Pearson even learned that the court had announced its intention to make a ruling, the trial court granted summary judgment for the defendants. Given these facts and Pearson's earlier response to the motions in which she stated that she had retained an expert witness and was working on obtaining the funds to secure a formal expert opinion, it was incumbent upon the trial court to give Pearson an opportunity to be heard on the status of her efforts.

In contrast, in *Blankenship v. Collier*, --- S.W.3d --- (Ky. 2009), the trial court gave the plaintiff ample opportunity to respond to the defendants' summary judgment motions, and the plaintiff was fully aware of the summary judgment motion being considered by the trial court. In *Blankenship*, after the first expert disclosure deadline expired, the trial court granted Collier, the plaintiff, a thirty-day time extension to disclose his medical experts. On March 14, 2008, two weeks after Collier's extended expert disclosure deadline expired with Collier still failing to name any experts, the defendants submitted their motions for summary judgment. Approximately four months later, on July 7, 2006, having still received no expert disclosures from Collier, the trial court held that without medical experts, Collier could not sustain his burden of proof and granted the defendants' summary judgment motions.

In *Blankenship*, Collier had four months to supplement his response to the summary judgment motions and to explain or correct his failure to make any expert disclosures. In Pearson's case, however, the trial court granted

summary judgment only eleven days after the extended deadline expired, five days after Norton Hospital requested that the court enter a ruling on its previously filed summary judgment motion and, most importantly, three days after the court conducted a status conference that Pearson could not attend.⁶ On review of this case, we conclude that the trial court should not have entered a ruling on the summary judgment motion until it either rescheduled the status conference or otherwise informed Pearson of its intent to address the pending motions, and then determined the status of her attempts to fund her alleged expert. In short, she had the right to be heard on the status of her alleged expert before the trial court ruled. Under these circumstances, the grant of summary judgment against Pearson was premature and an abuse of discretion.

Despite this Court's holding, we acknowledge that a trial court has discretion to rule on motions promptly, to follow its own jury trial scheduling orders, and to take actions to move the cases on its docket. This Court also recognizes that the better practice in this case would have been for Pearson to explain her failure to disclose expert witnesses to the trial court and to request an extension of time before the December 1st deadline expired. However, despite these concerns, the fact remains that in light of all relevant circumstances the trial court ruled on the summary judgment motion prematurely without giving Pearson an adequate opportunity to be heard.

⁶ We note that the summary judgments in *Blankenship* were granted seventeen months after the complaint was filed. The summary judgments in this case were granted nine months after the filing of the complaint.

CONCLUSION

In medical malpractice cases where experts are required to establish the appropriate standard of care, the plaintiff will not be able to sustain her burden of proof without obtaining expert witnesses. In this case, although the defendants had proper grounds for their summary judgment motions due to Pearson's failure of proof, the trial court abused its discretion by ruling on the defendants' summary judgment motions on December 12 without either rescheduling the December 9 status conference or otherwise notifying Pearson of the impending ruling and then determining the status of her attempts to fund the expert witness which she claimed to have retained. For these reasons, the Court of Appeals opinion is affirmed, the Jefferson Circuit Court's grant of summary judgment is vacated, and this action is remanded for proceedings consistent with this Opinion.

Minton, C.J.; Abramson, and Schroder, JJ., concur. Scott and Venters, JJ., concur in result only. Cunningham, J., concurs by separate opinion. Noble, J., dissents by separate opinion.

CUNNINGHAM, J., CONCURRING: I concur with the majority and write only to place emphasis upon the issue of the failure of the court to reschedule the status conference before making its decision. I am very appreciative of the hectic pace court scheduling can become and how due process violations can be inadvertently committed when they are sometimes hidden below the surface when managing a docket. However, it is what it is – a due process infraction. Pearson was told that nothing would happen on the case until she was afforded

a newly scheduled hearing. No hearing was set and the motion was ruled upon. But for this irregularity, I would have upheld the summary judgment.

NOBLE, J., DISSENTING: I joined the majority in *Blankenship v. Collier*, 2010 WL 246066, --- S.W.3d --- (Ky. 2010), because I agreed that under the facts of that case, summary judgment was appropriate. I fully agree with the majority that there comes a point in every trial requiring an expert witness when failure to have one allows the trial court to grant summary judgment. “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.” *Neal v. Welker*, 426 S.W.2d 476, 479 (Ky. 1968). I believe that is what the trial court did here.

The majority correctly states the legal test to be applied, which consists of two separate questions. The first question is whether a summary judgment motion was properly before the trial court. This turns on whether the opposing party had reasonable time to respond to the motion. This decision is reviewed for an abuse of discretion. *Blankenship*, 2010 WL 246066, at *1; *see also Pendleton Bros. Vending, Inc. v. Com. Fin. & Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988). If the court did not abuse its discretion in selecting the time to rule on the motion, the second question is whether a genuine issue of material fact actually existed in the record at that time. This second question is reviewed de novo. *3D Enters. Contracting Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005).

The second question is clearly not at issue in this case. As the majority correctly recognizes, in a medical malpractice case like this one, the plaintiff

must prove a breach of the applicable standard of care, and is thus “required by law to put forth expert testimony.” *Blankenship*, 2010 WL 246066, at *9; *see also Perkins v. Hausladen*, 828 S.W.2d 652, 655 (Ky. 1992). At the time the trial court ruled on the motion, however, there was *no* proof regarding this necessary medical testimony. Thus, the only question we must answer is whether the trial court abused its discretion by ruling on the motion prematurely. *Blankenship*, 2010 WL 246066, at *1. It is in answering this question that I must dissent.

At the time the court ruled on the motion, it had been under submission for several months. On at least five occasions, the Appellee claimed she had an expert witness, but failed to name him: when she failed to timely answer original discovery requests, even after two extensions of time from April 25 until June 30, 2005; when she eventually answered the discovery requests, but after the deadline and without naming her expert; when the summary judgment motion was first filed and she claimed in her response (after another extension of time) that she had an expert, again without naming him; when she failed to identify her expert after the court’s Civil Jury Trial Order set a deadline for disclosure on October 1, 2005; when she failed to disclose after an extension of time until December 1, 2005; and even when she filed her CR 59.05 motion to vacate the summary judgment order based on her failure to disclose.

The above record makes clear that when the trial court ruled on the summary judgment motion on December 12, 2005, it relied on a well-developed

record of the Appellee's failure to disclose her expert, despite ample time to do so. I am thus at a loss to understand how this Court can say the trial court abused its discretion by ruling when it did. If the trial court could not "let the curtain fall" at this time, when could it?

The gist of the majority's holding is that the trial court should have rescheduled the status conference or let the Appellee know that a ruling was imminent. However, the status conference is a red herring. The fact that the Appellee missed this conference (on December 9) is irrelevant because it cannot change the fact that a reasonable amount of time—and a hard deadline (on December 1)—had already passed. The trial court stated as much, noting at the conference that it would rule on the summary judgment motion later that week "not because [the Appellee] is not here . . . but because it's appropriate for the court to rule on it." And regardless, the Appellee admitted in a later affidavit that she could not retain the necessary expert at the time of the status conference. Thus, even if she had appeared, she would have explained that she still could not disclose the expert, despite ample time to do so. There can be no benefit from requiring further process that could not change the court's analysis.

And insofar as the majority's point is that the Appellee was entitled to notice as to when the trial court would rule, she had plenty of notice. The motion had been under submission for several months, and the trial court explained to the Appellee on two occasions that it would rule on the motion as a submission rather than at a hearing. The Appellee also knew that she had to

present a genuine issue of material fact, by disclosing her expert on or before December 1, 2005, or else lose on summary judgment. This was eleven days prior to the court's ruling. The majority stresses that the Appellee "had the right to be heard on the status of her alleged expert before the trial court ruled." I agree, but the key here is that she *already had* several opportunities to be heard: the court's last deadline had passed, just like all the ones before it, and she failed to make her disclosure or even to move for another extension prior to the deadline.

The majority also states that the trial court should have first "determined the status of [the Appellee's] attempts to fund her alleged expert" before ruling. However, when the court granted summary judgment, the status of her attempts was clear: she had failed, despite ample time to succeed. Indeed, this was clear even before the status conference, as she had not complied with the December 1 disclosure deadline. Moreover, it is not necessary, as a matter of law, for a trial court to base its rulings on the financial condition of a party, as the majority suggests.

Surely, it is within a trial court's discretion to consider financial hardship in its decision. However, I cannot say that the trial court abused its discretion by not asking at that late date why an expert witness had not yet been identified, after so many prior opportunities and at least one prior statement that Appellee had secured the funding for her expert. Thus I cannot say that the court abused its discretion in ruling on the motion when it did. While reasonable judges may have been more receptive to the Appellee's out of court

problems, I think that it was well within the trial court's discretion here, especially in light of all the prior extensions of time the Appellee had received and the hard deadline which had already passed. In other words, although it would not have been an abuse of discretion to give the Appellee one more chance to disclose, there was no abuse of discretion in finding that the prior opportunities had created a reasonable time for her to do so. It is insufficient to merely disagree with the discretion exercised by the judge.

Before ruling on the summary judgment motion, the trial court had to determine that the Appellee was given reasonable time to disclose her expert witness. The trial court did that in this case, relying on the multiple extensions of time it gave to her, its pretrial orders requiring disclosure by a date certain, and her complete failure to disclose her expert at any point along the way. I cannot say that this was an abuse of discretion.

This Court just decided *Blankenship*, and I find no principled way to distinguish that case from this one. The fact that this Appellee may be more sympathetic than the one in *Blankenship* cannot carry the day.

It is further true that the Appellee cannot avoid summary judgment by arguing that she could have made her case through other witnesses, such as her treating physicians or the defendant's experts. There is nothing in the record to indicate that her treating physicians would testify to the standard of care required in a medical negligence case, which would result in a directed verdict against her at the close of her proof. And, if she attempted to call the Appellant's witnesses in her case in chief as if on cross, there is nothing

developed in the record that would indicate they would testify in her favor. The simple fact is she had to have an expert testifying to the standard of care in her favor, and after many opportunities to produce such an expert, she did not do so.

Nor is there a viable argument that instead of granting summary judgment directly because of a failure of proof in the record at the time of the motion, the trial court should have instead considered CR 37.02 sanctions. One of the specific sanctions listed in the rule is that when a party has failed to comply with an order of the court, the court may prohibit that party from introducing such designated matters into evidence, CR 37.02(2)(b), and that decision must be reviewed for abuse of discretion. While this might not be fatal in all types of cases, in a medical malpractice case which requires testimony about the standard of care, had the trial court imposed the sanction of disallowing the expert testimony, the result would be the same.

For all the reasons the trial court had the discretion to let “the curtain fall” as described above, it could have alternatively decided to impose the CR 37.02(2)(b) sanction of prohibiting the evidence. If such a decision did not constitute an abuse of discretion, as it did not here, then the case would be ripe for a summary judgment motion based on the very ground the trial court ruled on in this case: failure of proof. In fact, it is arguable that this is what the trial court did here: by upholding its deadlines after several extensions, the court foreclosed the possibility of introducing the expert testimony, resulting in an absence of proof that made granting summary judgment proper. Whether

the trial court entered an order stating the sanction or not, there was a failure of proof in the record.

When the absence of the evidence at issue is fatal to prosecuting the claim, and the court exercises its discretion to either prohibit the evidence (under CR 37.02(2)(b)), or to examine the state of the record at the time the motion is decided (under CR 56), the claim fails and judgment against the plaintiff is proper.

Consequently, I would reverse the decision of the Court of Appeals and reinstate the judgment of the trial court.

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