IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-01728-COA

DANA J. DAVIS **APPELLANT**

v.

JASON HINDMAN, M.D. AND SURGERY ASSOCIATES, P.A. **APPELLEES**

DATE OF JUDGMENT:	09/18/2012
TRIAL JUDGE:	HON. PAUL S. FUNDERBURK
COURT FROM WHICH APPEALED:	LEE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	BOBBY FLOYD MARTIN JR.
ATTORNEYS FOR APPELLEES:	DAVID W. UPCHURCH ROBERT K. UPCHURCH JOHN MARK MCINTOSH
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
TRIAL COURT DISPOSITION:	APPELLEES' MOTION FOR SUMMARY JUDGMENT GRANTED
DISPOSITION:	AFFIRMED - 04/29/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

ROBERTS, J., FOR THE COURT:

¶1. Unsatisfied with Dana Davis's failure to take the necessary steps to secure Dr. Jason Hindman's deposition or secure her own expert witness to support her medical-malpractice claim, the Lee County Circuit Court granted summary judgment in favor of Dr. Hindman and Surgery Associates P.A. (collectively "Surgery Associates"). The circuit court simultaneously denied Davis's motion for additional time pursuant to Mississippi Rule of Civil Procedure 56(f). Davis appeals the circuit court's decisions and asks this Court to find that the circuit court abused its discretion in denying her motion for additional time, and that

the denial of her motion resulted in her inability to properly defend against Surgery Associates' summary-judgment motion. We find no error; therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. On September 2, 2009, Davis filed a complaint against Surgery Associates alleging that Dr. Hindman committed medical malpractice on September 10, 2007, when Dr. Hindman performed a total thyroidectomy on Davis. Attached to the complaint was a certificate of expert consultation from Davis's attorney stating that he "consulted with at least one . . . expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who was qualified to give expert testimony as to the standard of care or negligence in this matter."

¶3. Surgery Associates filed their separate answers and then separately propounded discovery on Davis. Davis filed her responses on November 25, 2009, and December 16, 2009. In one response, Davis stated that she had "not determined who will be called as an expert witness at the trial of this matter" even though she had consulted with an expert prior to filing her complaint. She also stated that she would supplement that information in accordance with the Mississippi Rules of Civil Procedure. Surgery Associates deposed Davis in June 2010, but a transcript of her deposition is not contained in the record.

¶4. On June 22, 2010, Davis requested dates that Dr. Hindman would be available to be deposed; Dr. Hindman provided several dates. However, there was no agreed date set based on this inquiry. Then, on October 18, 2010, Davis again requested dates for the deposition, which Dr. Hindman again provided. His deposition was initially set for December 20, 2010; however, this deposition was rescheduled by mutual agreement. Dr. Hindman sent Davis a

letter on December 14, 2010, confirming that he would provide future dates for his deposition. Dr. Hindman did not provide any dates nor did Davis request any dates until Surgery Associates filed a motion for summary judgment on October 28, 2011, some ten months later.

¶5. In the motion for summary judgment, Surgery Associates submitted that because Davis had not provided expert testimony to support her medical-malpractice claim, she failed to create a genuine issue of material fact. In response, Davis filed a motion for additional time pursuant to Rule 56(f). She argued that she needed additional time because she did not have "adequate time to take the deposition of . . . Dr. Hindman." And without his deposition as to how he performed her thyroidectomy, she could not provide expert testimony as to any deviations from the standard of care or treatment. The circuit court held a hearing on Surgery Associates' motion for summary judgment on February 21, 2012.

¶6. Just a few days prior, on February 3, 2012, Davis again requested dates to depose Dr. Hindman; Dr. Hindman responded that he would provide dates if the motion for summary judgment was denied. Davis then unilaterally scheduled Dr. Hindman's deposition for August 24, 2012. Dr. Hindman filed a motion to quash the notice of deposition, which the circuit court granted.

¶7. On September 18, 2012, the circuit court entered two orders: one order denying Davis's motion for additional time, and the other granting Surgery Associates' motion for summary judgment. The final judgment was entered on October 2, 2012, and Davis timely filed the present appeal.

¶8. She raises two issues on appeal:

I. Whether the [c]ircuit [c]ourt . . . properly denied . . . Davis['s] [m]otion for [a]dditional [t]ime[.]

II. Whether the [c]ircuit [c]ourt . . . properly granted [Surgery Associates'] [m]otion for [s]ummary [j]udgment[.]

ANALYSIS

I. RULE 56(f)

¶9. "A trial court has sound discretion to grant or deny a continuance under Rule 56(f)." *Stallworth v. Sanford*, 921 So. 2d 340, 342-43 (¶9) (Miss. 2006) (citing *Owens v. Thomae*, 759 So. 2d 1117, 1120 (¶10) (Miss. 1999)). "This Court will only reverse a trial court where its decision can be characterized as an abuse of discretion." *Id.* at 343 (¶9) (citation omitted).

¶10. Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

A party making a Rule 56(f) motion "must present specific facts why he cannot oppose the motion and must specifically demonstrate 'how postponement of a ruling on the motion will enable him, by discovery or other means, [to] rebut the movant's showing of the absence of a genuine issue of fact.'" *Scales v. Lackey Mem'l Hosp.*, 988 So. 2d 426, 434 (¶19) (Miss. Ct. App. 2008) (quoting *Owens*, 759 So. 2d at 1120 (¶12)).

¶11. According to Davis, the circuit court abused its discretion in denying her motion because she presented sufficient evidence as to why additional discovery was necessary to oppose Surgery Associates' summary-judgment motion. She submits that because she had yet to depose Dr. Hindman, she was unable to secure an expert witness to provide testimony

as to how he negligently performed her thyroidectomy and deviated from the acceptable standard of care.

¶12. In denying her motion, the circuit court stated that Davis had filed her complaint more than two years before Surgery Associates filed the motion for summary judgment, and that during that "considerable length of time, it does not appear . . . that any great effort [to take Dr. Hindman's deposition] was made by [Davis] . . . ." After Dr. Hindman's December 20, 2010 deposition was canceled by agreement, Davis "took no further action toward that end until July 23, 2012, some nine months after the filing of [Surgery Associates'] motion for summary judgment . . . ." It further stated that Davis had more than a fair opportunity to depose Dr. Hindman.

¶13. We cannot find that the circuit court abused its discretion in denying Davis's Rule 56(f) motion. "Rule 56(f) is not designed to protect the litigants who are lazy or dilatory . . . ." *Gammel v. Tate Cnty. Sch. Dist.*, 995 So. 2d 853, 859-60 (¶19) (Miss. Ct. App. 2008) (quoting *Owens*, 759 So. 2d at 1120 (¶¶11-12)). Dr. Hindman provided dates of several occasions on which he would be available for deposition, but Davis noticed his deposition only one time prior to Surgery Associates' motion for summary judgment, which was over two years after she filed her initial complaint. Davis argues that Dr. Hindman's deposition was necessary in order for her to secure an expert witness; therefore, she needed his deposition to properly oppose the motion for summary judgment. Her argument does not support a finding that the circuit court abused its discretion in denying her Rule 56(f) motion, as the taking of Dr. Hindman's deposition was not a condition precedent for finding an expert witness with which she could defend against the motion for summary judgment.

¶14. Therefore, we find this issue to be without merit.

II. MOTION FOR SUMMARY JUDGMENT

¶15. "The standard of review applied when reviewing a circuit court's decision to grant or deny a motion for summary judgment is de novo, and a motion for summary judgment is appropriately granted only when no genuine issue of material fact exists." *Posey v. Burrow*, 93 So. 3d 905, 907 (¶6) (Miss. Ct. App. 2012) (citing *PPG Architectural Finishes Inc. v. Lowery*, 909 So. 2d 47, 49 (¶8) (Miss. 2003)).

¶16. Davis argues that because the circuit court erred in denying her Rule 56(f) motion, the motion for summary judgment was granted in error because Rule 56(f) would have provided her more time to conduct discovery and better defend against a motion for summary judgment. However, we have found that the circuit court did not err in denying Davis's Rule 56(f) motion.

¶17. By filing a medical-malpractice claim, Davis knew "from the very moment the suit [was] filed that an expert witness [would] be needed to survive summary judgment." *Scales*, 988 So. 2d at 436 (¶23) (quoting *Brooks v. Roberts*, 882 So. 2d 229, 232 (¶10) (Miss. 2004)). "A plaintiff in a medical-malpractice case has the burden of proving '(1) the existence of a duty by the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) a failure to conform to the required standard; and (3) an injury to the plaintiff proximately caused by the breach of such duty by the defendant.'" *Johnson v. Pace*, 122 So. 3d 66, 68 (¶8) (Miss. 2013) (quoting *Hubbard v. Wansley*, 954 So. 2d 951, 956-957 (¶12) (Miss. 2007)). The plaintiff is generally required to establish these elements with expert testimony to survive summary judgment. *Id.* (citing

Smith v. Gilmore Mem'l Hosp. Inc., 952 So. 2d 177, 180 (¶9) (Miss. 2007)).

¶18. Davis failed to provide an expert witness at any point, even after her attorney submitted a certificate of expert consultation providing that he had consulted an expert "qualified to give expert testimony as to the standard of care or negligence in this matter" prior to filing suit. The record is void of any evidence, expert or otherwise, that Davis submitted beyond her initial complaint and her answers to Surgery Associates' discovery requests. Because Davis did not provide an expert witness as needed or any other evidence, we cannot find that there is a genuine issue of material fact; therefore, summary judgment in favor of Surgery Associates was appropriate.

¶19. This issue is without merit.

¶20. THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

LEE, C.J., GRIFFIS, P.J., BARNES, ISHEE, CARLTON AND MAXWELL, JJ., CONCUR. JAMES, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED IN PART BY IRVING, P.J. FAIR, J., NOT PARTICIPATING.

JAMES, J., DISSENTING:

¶21. The majority holds that granting summary judgment and denying Davis's motion to continue was proper. However, I find that neither decision was proper, and I respectfully dissent. The Supreme Court of Mississippi has held: "A decision to grant or deny a motion to continue or a motion to stay the proceedings pending the outcome of a separate action is within the sound discretion of the trial judge and will not be disturbed absent evidence of abuse." *Prescott v. Leaf River Forest Prods. Inc.,* 740 So. 2d 301, 307 (¶11) (Miss. 1999). However, each litigant is entitled to his day in court. I find that the trial court abused its

discretion in denying the continuance sought by Davis.

¶22. Further, the Mississippi Supreme Court has stated that "[a]n opportunity to flesh out discovery may especially be required where the information necessary to oppose the motion for summary judgment is within the possession of the party seeking summary judgment." *Owens v. Thomae,* 759 So. 2d 1117, 1120 (¶12) (Miss. 1999). Also, the nonmoving party must give specific facts as to why he cannot oppose the motion and how granting a postponement of the ruling or continuance would help him to oppose the motion. *Id.* Here, Davis required the doctor's deposition in order to oppose the motion for summary judgment.

¶23. Dr. Hindman argues that Davis had access to the medical records and could have propounded discovery. Live testimony cannot be replaced by medical records. In a deposition, Dr. Hindman can go into further detail as to his reasoning behind conducting the procedure in a particular fashion. Also, in order to fully understand medical records, Dr. Hindman is needed to explain them. By not allowing Davis an opportunity to depose Dr. Hindman, she was essentially denied the opportunity to further investigate her case. Davis fully articulated her reasoning behind wanting to depose the doctor.

¶24. It should be noted that Davis filed her complaint in September 2009. Davis obtained new counsel in May 2010, almost a year after the complaint was originally filed. Substituted counsel was diligent in his duties because he scheduled a deposition in December 2010, even though it was postponed by mutual agreement of both parties. Further, it appears from the record that potential dates were requested, but it is unclear as to whether or not Davis actually received those dates.

¶25. It is a "well established principle that summary judgments should be granted with

great caution." *Smith v. Braden,* 765 So. 2d 546, 556 (¶30) (Miss. 2000). Further, this Court has stated that "[a]s part of that exercise of discretion, the trial judge must have proof of diligence by the party seeking delay." *Hobgood v. Koch Pipeline Se. Inc.,* 769 So. 2d 838, 846 (¶38) (Miss. Ct. App. 2000). Here, Davis scheduled a deposition of Dr. Hindman, and once it was postponed, requested dates from Dr. Hindman for a deposition. The supreme court has also has stated that "[w]hile it is true that the non-moving party must be diligent in opposing summary judgment he must be given a fair opportunity to be diligent." *Smith v. H.C. Bailey Cos.,* 477 So. 2d 224, 233 (Miss. 1985) (internal citation omitted). Davis lacked the opportunity to complete her discovery because the trial court granted summary judgment against her, and did not grant her a continuance to get the deposition of Dr. Hindman.

¶26. In *Karpinsky v. American National Insurance Co.,* 109 So. 3d 84, 88 (¶10) (Miss. 2013), the Mississippi Supreme Court stated that "[s]ummary judgment is appropriate and shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[.]"

¶27. The appellate court "review[s] the grant or denial of a motion for summary judgment de novo, viewing the evidence 'in the light most favorable to the party against whom the motion has been made.'"*Id.* at (¶9). The Mississippi Supreme Court has stated that "[a]t the summary-judgment stage, [the] [d]efendants carried the initial burden of persuading the circuit court that no issues of material fact existed in this case and that they were entitled to [a] judgment as a matter of law." *Id.* at 89 (¶16).

¶28. I am of the opinion that genuine issues of material facts exist and Dr. Hindman and

Surgery Associates were not entitled to a judgment as a matter of law. I would therefore reverse and remand this case for further proceedings in the trial court.

IRVING, P.J., JOINS THIS OPINION IN PART.