

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000977-MR

MARSHALL TAYLOR

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 99-CI-00662

DR. GREG WHEELER

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: Marshall Taylor appeals from a summary judgment granted by the Floyd Circuit Court dismissing his complaint of medical negligence against Dr. Greg Wheeler. The circuit court correctly granted summary judgment, and we thus affirm.

In 1997 Taylor was referred to Dr. Wheeler, a neurosurgeon, concerning neck pain and other problems stemming from an on-the-job accident that occurred on April 11, 1997. On

October 30, 1997, Dr. Wheeler performed an anterior cervical discectomy C4-C5 with spinal cord decompression and allograft and instrumentation fusion. Although some improvement was noted, Taylor continued to experience pain and was again referred to Dr. Wheeler. On June 30, 1998, Wheeler performed an anterior cervical discectomy with structural allografting instrumental fusion at C3-C4 with exploration of fusion C4-C5. On August 5, 1999, Taylor filed a civil complaint against Dr. Wheeler in the Floyd Circuit Court. The complaint alleged medical negligence by Dr. Wheeler.

Following the filing of the civil complaint against Dr. Wheeler, he attempted to use the discovery procedures provided in the Kentucky Rules of Civil Procedure (CR) to learn the details of Taylor's claim against him. Dr. Wheeler first served interrogatories and requests for production of documents on Taylor in an attempt to determine the basis for the claim. Taylor failed to answer these discovery requests when they were due, and Dr. Wheeler subsequently filed a motion to compel after waiting several months. Taylor filed a response requesting an additional twenty days to prepare answers, and the court granted his motion and entered an order requiring him to answer the interrogatories and requests by April 13, 2000.

Taylor's answers were served five days after the court's deadline, but he did not provide adequate information

concerning his claim. In response to Interrogatory No. 2, wherein Taylor was asked to "state in specific detail each and every fact which you or your counsel claims constitutes negligence," Taylor responded by stating, "I am unable to give legal and/or medical conclusions and/or opinions as to liability in the matter." Taylor also failed to name any expert witnesses he intended to use in the litigation.

Dr. Wheeler's attorney took Taylor's deposition on November 8, 2000. When asked specifically what Dr. Wheeler did that caused Taylor to claim medical negligence, Taylor responded, "I don't know - I couldn't answer that." On December 8, 2000, Dr. Wheeler served requests for admission on Taylor in yet another effort to discover the nature of Taylor's claim and to identify the issues. No responses were ever filed.

Dr. Wheeler continued to use discovery procedures by filing a motion to compel Taylor to disclose his expert witnesses and their opinions. This motion was served on Taylor's attorney on December 7, 2000. At a hearing on December 22, 2000, the court granted Dr. Wheeler's motion and entered an order giving Taylor until February 15, 2001, to comply with CR 26.02 and disclose his expert witnesses and their opinions to Dr. Wheeler. Taylor did not comply with the order by disclosing expert witnesses, and, on February 19, four days after the deadline had expired, he filed a motion for an extension of

time. In support of his motion, Taylor stated that his inability to name expert witnesses was the fault of his consultant, a nurse named Donna Adkins, whom he had retained before filing suit. Taylor asserted that Adkins had not found experts to testify for him because she had undergone surgery and had been busy caring for her ill father. Although Taylor did not notice his motion for an extension of time for a hearing, Dr. Wheeler nonetheless filed an objection to the motion because it was filed after the deadline given by the court to provide the information.

On February 26, 2001, Dr. Wheeler filed a motion for summary judgment, wherein he asserted that there were no disputed issues of material fact and that he was entitled to judgment as a matter of law. In a hearing held on March 9, 2001, the circuit court granted summary judgment in favor of Dr. Wheeler. An order to that effect was entered on March 14, 2001. When the trial court denied Taylor's motion to alter, amend, or vacate the judgment, Taylor filed this appeal.

Taylor's argument in this appeal is that the circuit court erred in granting summary judgment in favor of Dr. Wheeler without first entering an order on Taylor's motion for extension of time. Taylor maintains that his "remedy at law was cut short before he had sufficient opportunity to file evidence in support

of his claim, due to circumstances beyond his control, by the inappropriate application of a summary judgment." We disagree.

"[E]xpert testimony is necessary to establish negligence in medical malpractice cases, unless the negligence was so apparent that laymen with general knowledge would have no difficulty in recognizing it." Maggard v. McKelvey, Ky. App., 627 S.W.2d 44, 49 (1981). As Taylor himself apparently could not recognize the negligence, he was clearly required to have expert witnesses to support his claim. He was given ample opportunity to procure an expert witness or witnesses to support his claim, but he failed to do so.

The circuit court had the authority to grant Taylor an enlargement of time in which to comply with the discovery requests even though Taylor did not file his motion until after the deadline occurred. See CR 6.02(b). In such cases, the failure to act must have been the result of excusable neglect before the motion may be granted. Id. Further, the granting of the motion is within the trial court's discretion. Id.; Montfort v. Archer, Ky., 477 S.W.2d 143, 144 (1970).

Taylor maintains that the court never ruled on his motion for extension of time. However, it is apparent from reviewing the transcript of the hearing that the court gave consideration to Taylor's motion. When it granted summary judgment in favor of Dr. Wheeler, the court implicitly denied

the motion for extension of time even though it did not state so specifically. Given the history of the case, we perceive no abuse of discretion by the court in its denial of the motion.

Furthermore, Taylor did not respond to Dr. Wheeler's requests for admissions. Therein, Dr. Wheeler requested Taylor to admit to various facts concerning his medical treatment, including that Dr. Wheeler's actions were within the appropriate standard of care. Because Taylor did not respond or otherwise answer the requests for admissions, the matters requested therein were deemed admitted by Taylor in accordance with CR 36.01(2).

In short, we conclude that summary judgment in favor of Dr. Wheeler was correctly granted by the circuit court. Taylor was given ample time to produce evidence in support of his claim, and he was unable to do so. It was within the discretion of the trial court to deny Taylor's motion for an extension of time. The grounds Taylor asserted as excusable neglect were not sufficient to render the court's denial of the motion an abuse of discretion.

The judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

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