

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000146-MR

LINDA SUSAN SMITH, EXECUTRIX OF
THE ESTATE OF GARY S. SMITH,
DECEASED; AND LINDA SUSAN SMITH,
INDIVIDUALLY

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 90-CI-007050

MILTON F. MILLER, M.D.; GALEN OF
KENTUCKY, INC., D/B/A COLUMBIA
SUBURBAN HOSPITAL, F/K/A HUMANA OF
KENTUCKY, INC., D/B/A HUMANA HOSPITAL
SUBURBAN; HUMANA, INC.; AND HUMANA
HEALTH PLAN, INC.

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BARBER, GUIDUGLI AND PAISLEY, JUDGES.

GUIDUGLI, JUDGE. In this wrongful death/medical negligence
action, Linda Susan Smith, Executrix of the Estate of Gary S.
Smith, Deceased, and Linda Susan Smith, Individually,
(hereinafter, collectively, "Smith") have appealed from multiple

pre-trial rulings and post-trial orders of the Jefferson Circuit Court. The circuit court granted a summary judgment to Galen of Kentucky, Inc., d/b/a Columbia Suburban Hospital, f/k/a Humana of Kentucky, Inc., d/b/a Humana Hospital Suburban (hereinafter "Suburban") on December 19, 2000, and directed a verdict in favor of Humana, Inc., and Humana Health Plan, Inc., (hereinafter, collectively, "Humana") at the close of the trial. The circuit court then entered a judgment in favor of Milton Miller, M.D. (hereinafter "Dr. Miller") after the jury returned a verdict in his favor and awarded no damages. Having reviewed the extensive record, the parties' briefs, and the applicable case law, we affirm.

The facts underlying this action are not essentially in dispute, although this case has an overwhelmingly complex procedural history, encompassing twenty-five volumes of record, four videotapes of various court hearings as well as the videotapes of a multi-day trial, which must be addressed for a complete understanding of the matter. Gary Smith, a Jefferson County police officer, began a doctor-patient relationship with Dr. Miller, an internist, in 1973, and in 1982 was diagnosed with hepatitis. Dr. Miller began a course of treatment for the hepatitis, including the use of the steroid Prednisone, an accepted treatment for hepatitis in the 1970s and 1980s. In 1988, Humana began providing health care coverage of Jefferson

County employees, including Gary Smith. In late 1988, Gary Smith experienced a flare-up of his hepatitis, and wanted a liver evaluation performed at the Mayo Clinic. Dr. Miller's office contacted Humana regarding this request, which was denied because facilities performing liver evaluations were located in Louisville. On July 1, 1989, Gary Smith was admitted to Suburban due to liver problems and was discharged on July 5, 1989. Dr. Miller referred Gary Smith to gastroenterologist Dr. Samuel H. Cheng and to hepatologist Dr. Carlo Tamburo. In late July, Dr. Miller's office contacted Humana regarding the possibility of a liver transplant. Although Humana indicated that Gary Smith's insurance probably would not cover a transplant, additional information was requested. Not until August 16, 1989, did Gary Smith request coverage for a liver transplant from Humana. Although Humana initially planned to deny coverage because his policy did not provide for this type of transplant, Humana nevertheless administratively approved coverage for the liver transplant on August 21, 1989. Gary Smith was then transferred to the Medical College of Virginia for the liver transplant. Tragically, Gary Smith died on August 29, 1989, before a transplant could be performed.

One year later, on August 28, 1990, Smith, through her attorney, H. Joseph Marshall, filed a 58-page Verified Complaint in Jefferson Circuit Court, naming Dr. Miller, Humana, Suburban,

Caretenders, Inc., and unknown defendants as the defendants and alleging several causes of action. She later filed First and Second Amended Complaints, and included claims against Humana of Virginia, Inc., d/b/a Humana Hospital University of Louisville (hereinafter "University Hospital"). Judge Rebecca Westerfield, the first judge assigned to this case, ordered the first two complaints as well as several paragraphs in the third complaint stricken as they were too long and confusing. Discovery began, and several defendants moved for summary judgments, all of which were denied. By this time, Judge Thomas Wine was the presiding trial judge. Several trial dates were scheduled, and then continued, for various reasons. Over the course of several years, the rancor between the attorneys representing Smith and those representing the various defendants became apparent in the motions filed and during court appearances. In June 1996, Smith had apparently terminated her attorney-client relationship with co-counsel, Alan Leibson, whom the trial court allowed to withdraw several months later. Both Caretenders and University Hospital were voluntarily dismissed in mid-1996. The matter was scheduled to go to trial in 1995, and then in 1996. The December 4, 1996, trial date was eventually continued to May 6, 1997.

As the May trial date grew closer, Smith continued to attempt to propound discovery from the defendants, and issued

several deposition/subpoena notices. In April 1997, attorneys Tim McCall and Brian Clare entered the case as co-counsel for Smith. However, the trial court entered an order on May 1, 1997, disqualifying McCall, and subsequently Clare, on Suburban's motion. At the hearing that day, attorney Marshall first indicated that they had all of the evidence, but later stated that discovery was not complete as they had not received anything. Attorney Marshall also indicated to the trial court that he had no other attorneys in his office and that the case was too much for one attorney to handle. On May 5, 1997, the day before the trial was to begin, attorney William McMurray entered an appearance as co-counsel for Smith, and moved the court to continue the trial for four weeks. He stated that attorney Marshall was physically unable to perform his duties and responsibilities as trial counsel and that he needed four weeks to review the large case file and to prepare for the complex trial. The trial court denied the motion to continue, noting that the information regarding attorney Marshall's health condition had been available to him for some time, and that he was only attempting to delay the trial. Smith petitioned this Court for a writ of prohibition and for intermediate relief, but she was denied any relief.

On May 6, 1997, the day of trial, Smith, through attorney McMurray, renewed her motion to continue the trial.

Through a bench ruling that day and in a written order entered the following day, the trial court denied the renewed motion to continue and then dismissed the case because Smith was not prepared to go to trial. In the written order, the trial court found that attorney Marshall was admitted into the hospital only after his motion to continue was denied and that this was for the dilatory purpose of delaying the proceedings. The trial court also found that Smith had condoned and acquiesced in these dilatory practices. In an opinion rendered April 23, 1999, and made final January 6, 2000,¹ a three-judge panel of this Court, with Judge Guidugli as the presiding judge, held that the trial court abused its discretion in denying the motion to continue and therefore reversed and remanded the matter for further proceedings. The Supreme Court of Kentucky denied discretionary review on December 9, 1999.

Upon remand, Smith filed a motion to recuse the trial judge, which was denied, and the Supreme Court agreed that there was not a sufficient basis to justify disqualification. However, on August 23, 2000, Judge Wine entered a *sua sponte* order voluntarily recusing himself and the case was randomly reassigned to Judge Geoffrey Morris in the Thirteenth Division. On September 1, 2000, the trial court entered an order scheduling a jury trial for August 21, 2001.

¹ Appeal No. 1998-CA-000410-MR.

On August 18, 2000, Suburban renewed its motion for summary judgment. On September 7, 2000, Smith filed a motion to stay Suburban's motion pending discovery.² Smith eventually responded to this motion. On December 19, 2000, the trial court entered a Memorandum and Order granting Suburban's motion for summary judgment as follows:

This action comes before the Court on a Renewed Motion for Summary Judgment brought by defendant [Suburban]. The plaintiffs have filed a Response to which Suburban has filed a Reply.

After a careful perusal of the memoranda submitted by the parties, the exhibits attached thereto and the applicable case and statutory law of this Commonwealth, this Court will grant the Motion for Summary Judgment brought by defendant [Suburban].

BACKGROUND INFORMATION

The decedent, Gary Smith, was a Jefferson County employee who was insured by Humana Insurance Plans and contracted hepatitis. As a result, Mr. Smith had chronic liver problems resulting in his death in August of 1989. Mr. Smith's surviving spouse, the plaintiff herein, has brought this action to recover damages for his death. Ms. Smith contends that the actions of the defendants, either in whole or separately, caused her husband's death as he did not receive a liver transplant, the only effective cure for his condition.

Suburban has brought a Motion for Summary Judgment contending that nothing it

² Attorney Marshall filed an amended motion to stay on September 11, 2000, which began the course of events leading to the imposition of Rule 11 sanctions against him. We have addressed the issue of Rule 11 sanctions in a separate opinion rendered this day in appeal No. 2002-CA-001146-MR.

did contributed to Mr. Smith's condition or his death.

MEMORANDUM

In Kentucky, a movant should not succeed on a summary judgment motion unless it appears impossible for the nonmoving party to produce evidence warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991). The term "impossible" is used in a practical sense and not in an absolute sense. Perkins v. Hausladen, Ky., 828 S.W.2d 652 (1992).

With this standard in mind, this Court will examine the arguments set forth by the parties. While Suburban has made a renewed Motion for Summary Judgment and the plaintiff has filed a Response to that renewed motion, this Court will return to the original memoranda filed by the parties wherein the issues upon which a decision must be made were more clearly set forth. The Response filed by the plaintiff to the renewed motion brought forth too many extraneous issues which are not properly before the Court. Consequently the Court will neither mention nor in any way rule on those extraneous issues.

Suburban asserts that, after treatment for over seven years for chronic liver disease, beginning in February of 1982, Mr. Smith was admitted to Suburban Hospital for five days in the beginning of July, 1989 for tests which were actually and accurately performed and then discharged at the direction of his primary care physician. The plaintiffs, however, contend that Suburban violated its standard of care.

The plaintiffs contend that Suburban was negligent in failing to maintain adequate standards for review. They argue that, as a result, Gary Smith was

prematurely discharged with 18 blood chemistries out of normal boundaries. Consequently, they contend that another physician did not review the case for a routine hepatic consult, and the possibility of an earlier liver transplant did not occur, resulting in his death. In their Trial Memorandum, the plaintiffs also cite to the following accusations against Suburban:

- i) Failed to utilize peer review on failure to complete discharge summary which would have conveyed seriousness of condition, and would have led to hepatic consult, earlier transplant;
- ii) Inadequate review of the charts for determination of whether treatment was proper as it occurred, which would have disclosed the need for hepatic consult and an earlier transplant;
- iii) If Gary Smith had been sent for a transplant at this time, he would have had a 90 - 95% survival rate on his transplant, but for the failures of the hospital in its reviewing function.
- iv) Discharged with 18 blood chemistries out of line, with no discharge plan, again a failure of the reviewing function, because this would have disclosed the need for hepatic consult and an earlier transplant.
- v) Failure to notify Gary Smith independently of his prognosis and current condition. Misinformed him and his family after discharge as to his condition, in an attempt to get him to delay further getting the transplant. Had he

been informed earlier, he could have mustered the available resources for an earlier transplant.

As set forth in Suburban's memorandum, the plaintiffs must show causation. In other words, the plaintiffs must prove the alleged deviation from the standard of care by Suburban's employees contributed to Mr. Smith's death. Actionable negligence requires a legal duty on the part of the defendant, a breach thereof, and consequent injury. The absence of any one of these elements is fatal to the claim. Mullins v. Commonwealth Life Insurance Company, Ky., 839 S.W.2d 245 (1992). "In any negligence claim, it is necessary to show that the defendant failed to discharge a legal duty or conform his conduct to the standard required." Mitchell v. Hadl, Ky., 816 S.W.2d 183 (1991).

Dr. Thomas Noble, an expert retained by the Plaintiff, testified in his deposition as follows:

Q. Similarly, there's another hospital sued called Humana Hospital Suburban, now called Suburban Medical Center. You do not have any opinions that are critical of the hospital care that was rendered at that hospital, do you, Doctor Noble?

A. There was one issue in terms of his July 1st and 5th admission [sic] to that hospital where his liver function tests were so dramatically elevated and he was discharged.

I think one has to ask, and I will look at the chart to see if this is clarified, why he was sent home with his liver still as in such terrible shape.

Admittedly that's a doctor's decision. On the other hand, quality assurance mechanisms are in place that no physician can get, as I know from the bylaws at work, can get privileges at a hospital without signing a statement that says he will abide by the bylaws, which usually require hospitals to monitor the performance of physicians.

And that's a kind of theoretical and somewhat unusual position perhaps, but I do think hospitals have some responsibility to physicians that practice there in terms of assuring that they are getting timely consultation and doing what they need to do to take care of the patients appropriately.

Q. Doctor, as we sit here today, are you expressing any opinion that is in any way critical of the hospital care that Gary Smith received at Suburban Hospital in Louisville?

A. My criticism is. . . .

A. . . . that he was sent home with dramatically elevated liver function tests, and that, at least in this day and age, that would have raised eyebrows or would have raised questions with the quality assurance. Quality assurance managers would have been on the case and would have raised questions with the physician eventually, if there was no response, with the administration.

And there are cases where the patient's care has been removed from a physician, too, and another

physician appointed when there is not adequate care being rendered by the physician.

Now, this has nothing to do with nursing and lab and all of those things. This has to do with a much more basic issue of what responsibility hospitals have for physicians that practice there. And they do, they do have a responsibility.

(Deposition of Thomas Noble, M.D., page 81, line 10 through page 83, line 18. Emphasis added.)

Suburban contends that, even assuming arguendo that the above testimony suggests that it breached its standard of care, the plaintiffs must still show that such breach substantially caused the injuries for which they seek recovery. Dr. Noble clearly sets forth that the only aid Suburban could render to Mr. Smith was to review the care his physician had given him while he was in the hospital. This could not possibly have been prior to Mr. Smith's dismissal. The situation Dr. Noble refers to, the hospital privileges of a physician, would have to be reviewed in a thorough manner. It could not have been done in a manner which would have contributed to Mr. Smith's chances of survival.

The duty of care for a patient is obviously shared by both the patient's personal physician and the employees of any hospital he may be treated in, however, in the present action there is no indication by the plaintiff that any of the employees of Suburban contributed in any way to Mr. Smith's illness or subsequent death. There is also no indication that, due to past actions, Dr. Miller's hospital privileges should have been suspended or under strict review by Suburban. As a result, this Court

will grant Suburban's Motion for Summary Judgment.

ORDER

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that the Motion for Summary Judgment brought by defendant [Suburban] be and hereby is GRANTED.

At the October 30, 2000, pre-trial hearing, the trial court made the statement that the case was ready for trial back in 1997, although counsel for Smith indicated that he was still unable to get discovery. On February 13, 2001, the trial court ordered the parties to exchange lists of witnesses to be called at trial by June 10, 2001, and lists of exhibits to be used at trial by August 10, 2001. By an order entered April 20, 2001, the trial court ordered the parties to name their experts by June 1, 2001, which was later amended to allow the defendants until July 1, 2001, to name their expert witnesses. During the course of these events upon remand, Smith served additional requests for admissions on both Dr. Miller and Humana, and again moved, unsuccessfully, for permission to take another deposition of Humana CEO David Jones. Attorneys Joel Frockt and Irvin Maze were permitted to enter appearances as additional counsel in March 2001.

On May 24, 2001, Smith moved the trial court to remand the August 21, 2001, trial date to allow discovery to be completed. The trial court denied this motion on June 1, 2001,

stating that the trial date was set in the fall of 2000 and that there had been ample time for any further discovery. Smith again moved to remand the trial date on June 20, 2001, citing the defendants' failure to answer interrogatories or to produce the written transplant policy. The trial court held a hearing on June 21, 2001, at which time Humana objected to Smith's naming of a new expert witness, Linda Peeno, after the June 1 deadline. The trial court excluded her because she was named after the cut-off date when there had been sufficient time for Smith to obtain additional witnesses and because there was a showing of prejudice in that a new expert was named only forty-five days prior to the trial. This ruling was memorialized by an order entered June 26, 2001. The trial court held another hearing on July 23, 2001, and heard arguments relating to Smith's next motion to remand the trial date. The defendants objected, and Humana contended that Smith had been permitted to conduct necessary discovery. Dr. Miller indicated that he had provided both insurance policies and that for a substantial length of time after the remand, Smith had done nothing to move the case along. The motion to remand was then denied by order entered July 25, 2001.

The matter proceeded to trial on August 21, 2001. Smith, again, moved the trial court to remand or reassign the trial date and reopen discovery. The trial court denied the

motion, and the trial commenced. At the close of Smith's case, both Humana and Dr. Miller moved the trial court for directed verdicts. As to Dr. Miller, the trial court at first denied the motion as to all claims, but later granted directed verdicts to him on all of the non-medical negligence claims and as to Smith's punitive damages claim. Neither of these directed verdicts have been appealed. Humana then argued that there was no evidence of a breach of contract in that although the policy did not cover Gary Smith's transplant, the transplant was approved when requested. The trial court denied the motion in order to give Smith her full day in court, noting that it would be revisited later in the trial. After the completion of Dr. Miller's presentation of evidence, Humana chose not to call any witnesses as they had all been called previously by Smith. The trial court again denied Smith's motion to call Dr. Peeno as a rebuttal witness as there were no witnesses called by Humana to rebut.

At the close of the trial, Dr. Miller's renewed motion for a directed verdict was again denied, although the trial court indicated that the motion was well taken. However, the trial court directed a verdict in favor of Humana, stating that there was insufficient evidence to allow the case to go to the jury. Smith then moved the trial court for a mistrial and to recuse itself, alleging that the trial court had prejudged the

case based upon its prior rulings and based upon its drafting of jury instructions before arguments had taken place. The matter proceeded to the jury, which returned with a unanimous verdict in favor of Dr. Miller. The final judgment was entered September 17, 2001. Smith filed a timely CR 59 motion to vacate, arguing that she did not have sufficient time to complete discovery, that the trial court erred in granting Suburban's motion for summary judgment and in granting a directed verdict in favor of Humana, that Dr. Peeno should have been permitted to testify, that Humana "sandbagged" her by not calling any witnesses, and that the trial court should have recused itself based upon the cumulative effect of its rulings to Smith's detriment. The trial court denied the motion on December 21, 2001, and this appeal followed.

Prior to addressing the merits of this appeal, we must address the issue of the defect in Smith's notice of appeal, which was the basis of this Court's show cause order entered August 25, 2003. On January 10, 2002, Smith filed a notice of appeal, specifically listing eleven separate rulings of the trial court as the basis of her appeal:

Notice is given that Linda Susan Smith, Executrix of the Estate of Gary S. Smith, Deceased, and Linda Susan Smith, Individually, hereby appeal to the Court of Appeals of the Commonwealth of Kentucky from the Memorandum and Order entered by this Court on December 19, 2000, from the

Memorandum and Order entered by this court on February 13, 2001, from the Order entered by this Court on February 22, 2001, from the Order entered by this Court on April 5, 2001, from the Order entered by this Court on April 20, 2001, from the Memorandum and Order entered by this Court on June 1, 2001, from the Order entered by this Court on June 26, 2001, from the Order entered by this Court on July 10, 2001, from the Opinion and Order entered by this Court on July 25, 2001, from the Findings of Fact, Conclusions and Order entered by this Court on August 14, 2001 and from the Order denying Motion to Vacate pursuant to CR 59 entered by this Court on December 21, 2001.

The names of the Appellees against whom this Appeal is taken are Milton F. Miller, M.D., Galen of Kentucky, Inc., d/b/a Columbia Hospital, f/k/a Humana of Kentucky, Inc., d/b/a Humana Hospital Suburban, Humana, Inc., and Humana Health Plan, Inc. The names of the Appellants are Linda Susan Smith, Executrix of the Estate of Gary S. Smith, Deceased, and Linda Susan Smith, Individually.

The first ten rulings are interlocutory in nature, and most deal with discovery issues, while some deal with the Rule 11 sanctions matter, and one is a summary judgment in favor of Suburban. The last order listed is from the order denying Smith's Motion to Vacate pursuant to CR 59. Nowhere in this list of eleven circuit court rulings did Smith include the actual trial judgment entered September 17, 2001. That order provides:

This matter came before the Court for a trial by jury beginning August 21, 2001. At the close of all of the evidence, the Court

granted motions for directed verdict in favor of defendants Humana, Inc., and Humana Health Plans, Inc.

The case against defendant Milton Miller, M.D. was submitted to the jury. Following deliberations, the jury returned a unanimous verdict in favor of Dr. Miller.

Accordingly, the Court enters judgment in favor of defendants, and this action is dismissed with prejudice at the plaintiffs' cost.

This is a final order, the Court having determined that there is no just cause for delay.

Pursuant to CR 73.03(1), "[t]he notice of appeal shall specify by name all appellants and all appellees . . . and shall identify the judgment, order or part thereof appealed from."

Pursuant to CR 54.01, "[a] judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the rights of the parties in an action or proceeding."

Therefore, an appellant must identify the final and appealable judgment in a notice of appeal.

In 1985, CR 73.02(2) was amended to establish a standard of substantial compliance, and reads as follows:

(2) The failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial. Failure to comply with other rules relating to appeals or motions for discretionary review does not affect the validity of the appeal or motion, but is

ground for such action as the appellate court deems appropriate, which may include:

- (a) A dismissal of the appeal or denial of the motion for discretionary review,
- (b) Striking of pleadings, briefs, record or portions thereof,
- (c) Imposition of fines on counsel for failing to comply with these rules of not more than \$500, and
- (d) Such further remedies as are specified in any applicable Rule.

While the rules relating to the filing of notice of appeal were once enforced under a standard of strict compliance, the Supreme Court of Kentucky in Ready v. Jamison, Ky., 705 S.W.2d 479 (1986), announced a standard of substantial compliance found in CR 73.03(2) for defects other than timeliness of the notice of appeal. In Ready, the Supreme Court reviewed three separate appeals in which the appellants failed to properly designate the final judgment as required in CR 73.03. In each case, the notice of appeal stated that the appeal was being taken from a post-judgment motion rather than from the final judgment. The Supreme Court held that:

Dismissal is not an appropriate remedy for this type of defect so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the opponent. While our court continues to have a compelling interest in maintaining an orderly appellate process, the penalty for

breach of a rule should have a reasonable relationship to the harm caused. Likewise the sanction imposed should bear some reasonable relationship to the seriousness of the defect.

Id. at 481-82. The Supreme Court went on to state that with the new policy of substantial compliance, it was seeking to "achiev[e] an orderly appellate process, decid[e] cases on the merits, and see[] to it that litigants do not needlessly suffer the loss of their constitutional right to appeal." Id. at 482. Later, in City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990), the Supreme Court of Kentucky declined to extend Ready's policy of substantial compliance to the failure to name an indispensable party because the action was jurisdictional in nature, unlike the situation in Ready.

In the present matter, although we would like to hold that Smith's failure to include the September 17, 2001, final judgment on her notice of appeal is fatal and requires a dismissal, we shall not do so because Smith did list the order denying her post-judgment CR 59 motion, as was the case in Ready. Therefore, we find that Smith has shown sufficient cause not to dismiss the appeal and we shall review this matter on the merits.

In the introduction to her brief, Smith states, "[a]t the heart of this Appeal is the Appellants' failure to obtain meaningful discovery and the Court's failure to grant the

Appellants a continuance of the trial to complete discovery." Accordingly, Smith argues that she was denied a reasonable opportunity to obtain discovery and that the trial court erred in denying her motion to continue the trial. Furthermore, Smith argues that the trial court erred in granting Suburban's motion for summary judgment, in granting Humana a directed verdict, and in denying her motion for disqualification and for a mistrial.

On the other hand, Humana argues that the trial court properly granted its motion for directed verdict because Smith did not introduce sufficient evidence to sustain a verdict in her favor and that the trial court did not abuse its discretion in its rulings on discovery and evidentiary matters. Suburban, in turn, argues that the trial court's ruling on its motion for summary judgment was not premature and that Smith did not present sufficient evidence to establish that Suburban breached its duty or that any alleged deviations from the standard of care caused Gary Smith's death. Lastly, Dr. Miller argues that no testimony related to his contract with Humana was excluded as the trial court permitted Smith to ask all of the questions she chose to ask, and that Smith failed to identify any discovery delay relating to him.

I. DISCOVERY, PRE-TRIAL AND TRIAL RULINGS

In her brief, Smith has raised several arguments regarding various rulings of the trial court regarding discovery

matters, continuances, and recusal. In particular, Smith argues that due to adverse rulings regarding discovery, she was not permitted to establish the core theory of her case. She collectively blames the defendants below for delays in obtaining and for obstructing discovery. She also argues that she was denied a reasonable opportunity to engage in discovery, citing her inability to take, or complete, depositions of Humana CEO David Jones and corporate representative Richard Remmers, the trial court's exclusion of Dr. Linda Peeno as a witness, Humana's failure to timely produce written organ transplant policies and procedures, and the trial court's exclusion of Dr. Miller's testimony regarding his contractual relationship with Humana. Additionally, Smith asserts that the trial court erred in denying her motion to remand the trial date due to a failure to obtain discovery and in denying her motion for a mistrial and for recusal. The appellees have all argued that the trial court did not abuse its discretion in making its various rulings.

Our standard of review in matters involving a trial court's rulings on evidentiary issues and discovery disputes is abuse of discretion. Sexton v. Bates, Ky.App., 41 S.W.3d 452, (2001); Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.2d 575 (2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by legal principles." Id. at 581.

As to Smith's arguments regarding her motions to continue or remand the trial due to lack of discovery, we cannot hold that she has raised any issue of merit. As pointed out in Suburban's brief, the day before and the day of the May 1997 trial, Smith's counsel indicated that the case was ready to go to trial but for lead counsel, attorney Marshall's physical and mental problems. Smith's new attorney indicated that he needed only a four-week continuance to allow him sufficient time to review the record prior to going to trial. At no time did he indicate that discovery was in any way incomplete or lacking.³ Therefore, upon remand, the matter should have been ready to proceed directly to trial. That the trial court allowed the parties to continue with discovery to at least update their witnesses has no bearing on Smith's contention that she was not permitted a reasonable opportunity to engage in discovery. She filed her lawsuit in 1990, almost seven years prior to the 1997 trial date. She then had close to two years to continue discovery once the case was remanded for further proceedings. Smith had what amounted to nine years in which to seek out and obtain discovery in this matter. She cannot argue that she was

³ We note that in the week before trial, attorney Marshall moved for a continuance citing the lack of response to his discovery requests. However, this was not raised by the attorney requesting the continuance on either the day before or the day of trial. We also note that in the January 29, 2001, hearing, attorney Marshall indicated, incorrectly, that the case was not ready at the time of the 1997 trial date due to discovery issues, not due to his physical and mental condition.

not provided with a "reasonable opportunity" over that nine-year period. Therefore, we must hold that the trial court did not abuse its discretion in denying Smith's motions to continue or remand the trial date due to a failure to complete discovery.

We also cannot accept Smith's argument that her attempts at discovery were blocked or delayed, precluding her from establishing her case. The trial court did not abuse its discretion regarding the taking of David Jones's deposition as he had already been deposed once and would be available to testify at trial. As to the deposition of Richard Remmers, we agree with Humana that Smith did not preserve this issue as the trial court never actually ruled on her motion to compel. Additionally, we agree that the trial court properly limited the questions that Smith could ask Remmers in his capacity as a corporate representative during the deposition.

We also agree that the trial court did not abuse its discretion in denying Smith's attempt to include Dr. Peeno as a witness at trial, in particular because she was not timely identified as a witness. Smith had more than sufficient time to identify and locate her expert and lay witnesses over the many years this case was pending prior to going to trial, so that the trial court's refusal to extend the time limitation was well within its discretion. We can also find no error in Humana's late production of the written transplant policy and procedure

documentation in that the old documents were eventually located and produced and in that Smith could not show any harm. Lastly, we agree with Dr. Miller that Smith was permitted to ask the questions she chose to regarding Dr. Miller's contract with Humana.

Finally, we agree that the trial court properly denied Smith's motion for disqualification and for a mistrial as the alleged errors on which she relied we have held were not errors.

II. DIRECTED VERDICT IN FAVOR OF HUMANA

At the close of Smith's case, Humana moved for a directed verdict, arguing that Smith had failed to establish a cause of action for breach of contract. Smith did not submit any evidence that the contract covered Gary Smith's liver transplant. However, the transplant was administratively approved once it was requested and there was no evidence that there would have been a difference in his survival had the request been approved on August 17 rather than on August 21. Smith argued that there was a factual issue as to what Humana knew. Although indicating it was inclined to direct a verdict in Humana's favor, the trial court nevertheless allowed Smith her full day in court and denied Humana's motion. At the close of the trial, however, the trial court ruled that Humana was entitled to a directed verdict as there was insufficient evidence of a breach to take to the jury.

In her brief, Smith argues that her claims against Humana were for insurance bad faith rather than in the nature of medical malpractice. She argues that she had established sufficient evidence to allow her to go to the jury in that Humana violated KRS 446.070 by allowing unlicensed adjusters to make coverage decisions, that Gary Smith's policy did not include within its body all of its criteria and exclusions, and that Humana failed to communicate its denial of coverage to Gary Smith. Humana, on the other hand, notes that Smith did not plead a cause of action in her second amended complaint under the Unfair Claims Settlement Act or one for bad faith, but only alleged claims of medical malpractice, fraud and breach of contract. However, she failed to establish even these "new" causes of action. Additionally, the claims she did plead were unsupported by the evidence presented at trial.

Our standard of review regarding a ruling on a motion for directed verdict pursuant to CR 50.01 is well settled in the Commonwealth.

On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814

(1992). Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. Davis v. Graviss, Ky., 672 S.W.2d 928 (1984).

In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented. Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses. Cf. Taylor v. Kennedy, Ky.App., 700 S.W.2d 415 (1985).

Bierman v. Klapheke, Ky., 697 S.W.2d 16, 18-19 (1998). We agree that Smith failed to present sufficient evidence to overcome Humana's motion for a directed verdict.

Because Smith did not dispute Humana's assertion that she raised several issues in her brief regarding causes of action not raised below, we shall decline to review those arguments, although we note that they are without merit. These allegations include Smith's claims that non-licensed insurance adjusters were deciding Gary Smith's coverage and treatment and

that the insurance policy did not contain all of the criteria and exclusions.

As to Smith's identifiable claims against Humana for medical malpractice, fraud and breach of contract, we agree with Humana that the evidence presented did not support those causes of action. Smith admitted in her brief that her claims against Humana did not include a claim for medical malpractice. Additionally, she failed to introduce sufficient evidence to establish the six-prong test for fraud.⁴ Smith's breach of contract claim also fails because Gary Smith's request for a liver transplant was actually approved once it was made, and Humana paid for all of the services related to the transplant, although the transplant never took place.

Based upon the evidence presented at the trial of this matter, we must hold that the trial court did not commit any error in directing a verdict in favor of Humana at the close of evidence.

III. SUMMARY JUDGMENT IN FAVOR OF SUBURBAN

We shall next address Smith's argument that the trial court improperly granted Suburban's motion for summary judgment.

⁴ "In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury." UPS v. Rickert, Ky., 996 S.W.2d 464, 468 (1999).

Our standard of review in summary judgment matters is well settled in the Commonwealth.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, 807 S.W.2d at 480, citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . ." Huddleston v. Hughes, Ky.App., 843 S.W.2d 901, 903 (1992), citing Steelvest, supra (citations omitted).

Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996). With this standard in mind, we shall review the trial court's decision to grant Suburban's motion for summary judgment.

In her brief, Smith argues that the trial court should not have granted a summary judgment to Suburban because the ruling was premature, because the trial court failed to consider her responses filed in 2000 to the Suburban's renewed motion,

and because Suburban was not entitled to a summary judgment as it breached its independent duties to Gary Smith. We disagree.

First, we agree with Suburban that the trial court did not prematurely rule on its motion for summary judgment. Smith clearly had sufficient time to complete her discovery, and in fact her attorney announced that the case was ready for trial in 1997 but for her lead attorney's sickness. Therefore, she cannot claim that discovery had not been completed once the case was remanded. Additionally, Smith's attempt to re-take the deposition of David Jones came after Suburban had filed its renewed motion for summary judgment. Next, we also agree with Suburban that the trial court did not ignore information contained in Smith's responses filed in 2000. The trial court indicated that the later documents were read, but contained too many extraneous issues.⁵

Finally, we agree that Suburban was entitled to a summary judgment because Smith failed to establish that Suburban breached its duty of care or that any possible breach caused Gary Smith's death. As we cannot improve upon it, we shall adopt the trial court's well-reasoned opinion as set out hereinabove.

CONCLUSION

⁵ One of these responses was a portion of Smith's 200-page sealed response.

For the foregoing reasons, the rulings and judgments of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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