

RENDERED: SEPTEMBER 5, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001072-MR

TAMMY J. SHEWMAKER, INDIVIDUALLY, AND AS
REPRESENTATIVE OF THE ESTATE OF JAMES P.
SHEWMAKER

APPELLANT¹

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 99-CI-02622

RMD HOME OFFICE INC., HOOTERS OF AMERICA;
HOOTERS RESTAURANT OF LEXINGTON; AND
HYSINGER GROUP, LLC

APPELLEES²

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE, KNOFF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from a summary judgment entered against the plaintiff in a negligence action alleging that Hooters Restaurant served plaintiff's husband tainted

¹ The order appealed from also dismissed the claim of Tammy J. Shewmaker, natural mother and guardian of her two infant children. She did not include the children's claims in the notice of appeal.

² These appellees were taken from the notice of appeal but the order appealed from and the appellees' brief claim the appellees are "Man-O-War Lexington Joint Venture and Hooters of America, Inc."

oysters which caused him to contract Hepatitis B and die. Because appellant presented no evidence that consumption of the oysters caused the decedent's illness, we agree that summary judgment was proper. Hence, we affirm.

On July 23, 1999, appellant, Tammy Shewmaker, filed a negligence action on behalf of herself, the estate of her husband, James Shewmaker, and her two children against RMD Home Office, d/b/a Hooters Restaurants, Inc. ("Hooters"), alleging:

3. That on or about July 25, 1998 in Fayette County, Kentucky, the decedent was served shellfish at the Hooters Restaurant on 3101 Richmond Road, Lexington, FAYETTE County, Kentucky.

4. Subsequent to that, the decedent contracted Hepatitis B and died of said disease on September 15, 1998.

Relative to specific claims of negligence, Shewmaker alleged: that Hooters was negligent in acquiring, preparing and serving the shellfish; that Hooters was negligent in inspecting and failing to warn the decedent of the danger of eating the shellfish; strict liability in selling the shellfish in an unreasonably dangerous condition; and breach of express/implied warranties that the shellfish was safe to eat.

We must note from the outset that the record before us is unclear as to the events leading up to James Shewmaker's death due to the fact that the depositions in the case were not designated as part of the record pursuant to CR 75.01(1) as we

shall discuss further below. However, in accepting certain undisputed facts in the briefs before us, we glean that James ultimately received a liver transplant as a result of liver failure caused by the Hepatitis B. On September 15, 1998, James apparently died of complications from the liver transplant.

Subsequent to the filing of the action, Shewmaker responded to interrogatories but took no discovery in the case, even though the court had scheduled a deadline of November 16, 2001 for completion of discovery and disclosure of her experts. Hooters took the depositions of Tammy Shewmaker and Dr. Kristine Kreuger, a gastroenterologist at the University of Kentucky Medical Center, who was one of the decedent's treating physicians.

On February 21, 2002, Hooters filed a motion for summary judgment claiming there were no genuine issues of material fact as to causation of the decedent's illness. Hooters maintained that because Shewmaker failed to present any evidence that ingestion of the oysters at Hooters caused the decedent's Hepatitis B, she would not be able to sustain her burden of proof in the case. Shewmaker responded to the motion, claiming that the testimony in her own deposition as well as the medical records from various doctors/hospitals presented sufficient evidence of causation to preclude summary judgment.

From the order granting Hooters' motion for summary judgment, Shewmaker now appeals.

Shewmaker argues that there was sufficient evidence of causation to withstand summary judgment, citing Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991), wherein it was held that only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted. Under CR 56.03, summary judgment should be granted when, drawing all factual inferences in favor of the nonmoving party, the court can conclude there are no issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fischer v. Jeffries, Ky. App., 697 S.W.2d 159 (1985).

As noted earlier, the only depositions taken in the case were those of Tammy Shewmaker and Dr. Kristine Kreuger, and neither party designated those depositions as part of the record on appeal as required by CR 75.01(1). See also CR 75.07(1). It has been held that the burden is on appellant to designate that part of the record necessary for an adequate review of the case. Fanelli v. Commonwealth, Ky., 423 S.W.2d 255 (1968). The duty is on the appellant to see that the record is complete on appeal and where the record is incomplete, the reviewing court must assume that the omitted portions support the trial court's

order. Commonwealth, Dept. of Highways v. Richardson, Ky., 424 S.W.2d 601 (1967). Since the depositions in question are not in the record, we must presume they support the trial court's judgment. That leaves us with only the pleadings and the medical records attached to Shewmaker's response to the motion for summary judgment in determining the propriety of the summary judgment.

It is Hooters' position that the mere allegations of causation arising out of the circumstantial evidence in this case (that the decedent contracted Hepatitis B following ingestion of the oysters at Hooters) are not sufficient to establish causation in this case. Hooters maintains that expert medical testimony would be necessary to prove that the decedent's consumption of oysters caused his Hepatitis B. We agree.

Circumstantial evidence is sufficient to prove reasonable probability or proximate cause where the evidence reasonably establishes a causal connection between the alleged negligence and the injury. Johnson v. Vaughn, Ky., 370 S.W.2d 591, 597 (1963). Expert medical testimony is necessary when common knowledge or experience of laymen is not extensive enough to infer negligence from the facts. Jarboe v. Harting, Ky., 397 S.W.2d 775 (1965); Baylis v. Lourdes Hospital, Inc., Ky., 805 S.W.2d 122 (1991).

In the instant case, we do not believe that the sole fact that James Shewmaker ate oysters at Hooters and subsequently was found to have Hepatitis B, even assuming that the oysters were tainted, reasonably establishes a causal connection between the ingestion of the oysters and the illness. The causal connection between these two facts is not within the common knowledge or experience of laymen and, thus, would require expert medical testimony. Shewmaker submitted no such expert testimony. Contrary to her assertions, the medical records in the case do not establish such a connection.

Several of the medical records mention James giving a history of eating oysters at Hooters in July. In a history given to his family physician on August 19, 1998, James reported that he had eaten raw oysters at Hooters four weeks prior "but did not become sick following this." In another history given at the emergency room on September 12, 1998, James related that he ate raw oysters in July and began to get sick in early August. None of the records, however, stated the oysters were the suspected cause of his illness. In fact, one of the notations in the records from University of Kentucky Hospital stated that it was unlikely that the Hepatitis B was from ingestion of the oysters. As there was no expert medical evidence establishing a causal link between the consumption of

the oysters and the Hepatitis B, the trial court properly entered summary judgment in Hooters' favor.

Shewmaker argues, in the alternative, that even if partial summary judgment was proper as to the claim that the oysters caused the decedent's Hepatitis B, she should still be able to proceed with a claim for the decedent becoming sick at his stomach as a result of eating the oysters. In viewing Shewmaker's complaint, we see that she did not plead that James suffered any illness other than the Hepatitis B from the oysters. Accordingly, she cannot proceed on a separate theory of the case she failed to plead.

For the reasons stated above, the summary judgment entered by the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elmer J. George
Lebanon, Kentucky

BRIEF FOR APPELLEE:

John F. Parker, Jr.
William P. Swain
Louisville, Kentucky