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OCTOBER 12, 2005 (2005-SC-0514-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000977-MR

PATRICIA TURNER,(PERSONAL REPRESENTATIVE
OF THE ESTATE OF ARTHUR G. TURNER, DECEASED)[1] APPELLANT

APPEAL FROM PERRY CIRCUIT COURT
v. HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 00-CI-00517

APPALACHIAN REGIONAL HEALTHCARE,
INC., D/B/A APPALACHIAN REGIONAL
HOSPITAL; and CHUKS ONWU, M.D. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[2]

[1] Patricia Turner substituted as appellant, subsequent to the death of Arthur Turner, by order entered April 15, 2005.

[2] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

VANMETER, JUDGE: Arthur Turner filed a medical malpractice action against his surgeon and the hospital in which the surgery was performed. After Turner failed to identify an expert witness for nearly three and a half years, both defendants filed motions for summary judgment. We must decide whether the affidavit of a consulting expert satisfied the requirement of CR 56.03 and 56.05 to establish the existence of a genuine issue of material fact sufficient to defeat a motion for summary judgment, and whether the trial court properly entertained the hospital's motion, although heard on less than the ten days' notice required by CR 56.03. We hold that the affidavit of a consulting expert is not sufficient and that, under the circumstances of this case, the trial court did not err in hearing the hospital's motion. We therefore affirm the summary judgment of the Perry Circuit Court dismissing the action.

The plaintiff, Arthur G. Turner, was a patient of Dr. Chuks Onwu at Appalachian Regional Hospital ("ARH") in September 1999. Following surgery performed by Onwu, Turner developed complications and was transported to the University of Kentucky Medical Center where he underwent additional surgery. Turner filed a complaint in September 2000 against Onwu and ARH alleging that their negligence was the cause of his complications and damages. Both defendants in their respective answers denied negligence.

In March 2001, Turner's deposition was taken. By June 2002, Turner had taken no steps to prosecute the action and Onwu filed a motion to dismiss under CR 41.02. ARH joined in this motion. At about the same time, the trial court, apparently coincidentally, entered its own show cause order regarding possible dismissal for lack of prosecution.[3] The result of these motions was a scheduling order entered by the trial court on August 20, 2002. The trial court ordered Turner to identify his expert witnesses, "including all standard of care and causation experts, with corresponding CR 26.02(4) information" within 120 days, or by December 18, 2002. The order further noted that the pending motions to dismiss for lack of prosecution would be passed "subject to the Plaintiff's identification of expert in compliance with the deadlines imposed in this Order."

In March 2003, both defendants filed motions for summary judgment on the ground that Turner had failed to provide expert testimony that they had deviated from the applicable standard of care. Before a hearing was conducted on the motions, which had been continued for reasons not clear from the record, ARH filed a motion to stay the proceedings because its insurer was insolvent. The trial court granted this motion, staying proceedings until a scheduled January 16, 2004 status conference, but it ordered ARH's counsel to produce an

[3] CR 77.02(2).

additional set of medical records and a set of x-rays. These documents were produced in October and November 2003. As a result of the status conference, the trial court, by order entered January 26, removed the case from the inactive docket and placed it back on the active docket.

On January 19, 2004, Onwu's counsel requested the identity of Turner's expert witnesses, and indicated he intended to renew his motion for summary judgment if notification was not made in thirty days. After identification did not occur, Onwu filed his renewed motion for summary judgment on February 24 and noticed it for hearing on March 5, 2004. On February 25, ARH filed a motion for summary judgment as well, adopting the arguments of Onwu and likewise setting its motion for hearing on March 5.

On the day of and immediately before the scheduled hearing, Turner filed a response to the motions. In his response, Turner objected to the ARH's failure to comply with the ten-day notice requirement of CR 56.03, and he attached an affidavit of his consulting expert, Alexander Mead, M.D., who criticized Onwu's, but not ARH's, actions. In response to questioning by the trial court, Turner's counsel candidly admitted that Mead was a consulting expert and not an expert witness. Additionally, Turner's counsel did not request a continuance of the summary judgment hearing. The trial court

took the motions under advisement and by order entered March 11, 2004 granted the motions for summary judgment.

Turner subsequently filed a motion to vacate, which motion was overruled. This appeal followed.

On appeal, a reviewing court must determine "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."[4] The record is to be reviewed in a light most favorable to the party opposing the motion for summary judgment, and all doubts are to be resolved in his or her favor.[5]

In a medical malpractice case, expert testimony is required to establish the standard of care and whether a breach of the standard of care occurred.[6] The plaintiff's failure to provide expert medical proof is generally fatal to his or her cause of action, and such a case is appropriate for summary disposition under CR 56.[7] While Kentucky case law recognizes two exceptions to the requirement for expert testimony in medical

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[4] *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

[5] *See Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991).

[6] *Jarboe v. Harting*, 397 S.W.2d 775, 777 (Ky. 1965); *Morris v. Hoffman*, 551 S.W.2d 8, 9 (Ky.App. 1977).

[7] *Simmons v. Stephenson*, 84 S.W.3d 926, 928 (Ky.App. 2002).

malpractice cases,[8] Turner concedes that those exceptions are not applicable to his case.

Onwu's Motion for Summary Judgment.

As to Onwu's motion for summary judgment, Turner argues that he had presented sufficient evidence, in the form of Mead's affidavit, to survive summary judgment. While Mead's affidavit is critical of Onwu, importantly Turner identified Mead as his consulting expert and not as a testifying expert.

As previously noted, expert testimony is required to establish the standard of care and the breach of the defendant in meeting the standard of care. The determination of whether any genuine issue of material fact exists is based on the "pleadings, depositions, answers to interrogatories, stipulations and admissions on file, together with the affidavits"[9] tendered in support of, or in opposition to, the motion. CR 56.05 sets forth the requirements for affidavits supporting or opposing summary judgment. Such affidavits "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the

[8] *See Perkins v. Hausladen*, 828 S.W.2d 652, 655 (Ky. 1992) (the exceptions are (1) situations in which a lay person can conclude that such things do not happen if proper skill and care has been used, such as when a foreign object is left in the body, and (2) situations in which the defendant doctor makes admissions of a technical character from which an inference of negligence can be made).

[9] CR 56.03.

affiant is competent to testify to the matters stated therein."[10] An affidavit containing evidence that would not be admissible at trial, such as hearsay evidence, does not suffice.[11]

At all points in the proceeding, Mead was presented by Turner as being his consulting expert, whose function was to assist Turner in securing an expert to testify at trial on Turner's behalf. Further, Mead's affidavit identifies him as a consulting expert, and at the hearing on the summary judgment motion, Turner's counsel, while not ruling out that Mead may ultimately testify, stated, "[i]n all candor to the Court [Mead] is a consulting expert." As such, any discovery of facts known to and opinions held by Mead would be limited,[12] since the rules contemplate that such an expert witness will not be called to testify at trial.[13] As a consulting expert is not to testify at trial, Mead's affidavit did not meet the requirements of CR 56.05.[14] While authority exists that any objection to an affidavit that does not meet the requirements of CR 56.05 is waived if a party fails to move to strike the deficient affidavit, the record in this case is clear that Onwu in fact objected to the use of Mead's affidavit at the March 5 hearing.

[10] CR 56.05.

[11] *Nelson v. Martin*, 552 S.W.2d 668, 670 (Ky.App. 1977).

[12] CR 26.02(4)(b).

[13] *Id.*

[14] *Chappell v. Bradley*, 834 F.Supp. 1030, 1033 (N.D. Ill. 1993).

Since Turner failed to name his expert witness as previously ordered by the trial court, and failed to present any admissible expert testimony that Onwu had failed to meet the applicable standard of care, the Perry Circuit Court properly granted summary judgment in favor of Onwu.

Turner argues that the trial court erred in failing to vacate the summary judgment upon his filing of additional information from a Dr. Stephen A. Hurst. As an initial matter, we note that the information from Dr. Hurst was not signed, notarized, or provided on any sort of professional letterhead or stationary. Thus, that information clearly did not comport with the requirements of CR 56.05. Second, the ten-day notice requirement of CR 56.03 exists precisely to give an opposing party ample time to line up affidavits in a form sufficient to satisfy the rule. Not only did Turner fail to do so within the time period contemplated by CR 56.03, i.e., by March 5, 2004, the date of the original hearing on the summary judgment motion, but he also failed to do so by the time the motion to vacate was heard on April 16, some six weeks later. The trial court did not abuse its discretion in failing to vacate the summary judgment in favor of the defendants.

ARH's Motion for Summary Judgment.

With respect to ARH's motion for summary judgment, Turner complains that the trial court erred in granting summary

judgment following a hearing held on less than the ten-day notice required by CR 56.03. Turner does not complain of the notice provided by Onwu.

In *Perkins v. Hausladen*,[15] the Kentucky Supreme Court declined to adopt a hard and fast rule with respect to the ten-day notice requirement. The court stated:

> We need not decide whether there is an inflexible rule that violation of the ten day notice requirement requires automatic reversal. There may be unusual situations where no possible prejudice could have resulted from a premature hearing. But this case is not one of them. As pointed out in their Brief, the Perkinses were put at a "disadvantage by not being able to put on any affidavits, additional legal research, nor other evidence to contradict the motion."
>
> In a complex negligence case, such as this, the nuances of the pretrial depositions and discovery cannot be properly addressed or fairly assessed at a summary judgment motion made on the day of trial.[16]

The court in *Perkins*[17] also quoted at length the treatise on *Kentucky Practice:*

> "As the annotations following the sub-rule demonstrate, the 10-day lead time provided before hearing the motion is extremely important and, although not jurisdictional, may not be lightly disregarded. . . . [R]equests for extension of time to respond

[15] 828 S.W.2d 652.

[16] *Id.* at 656-57.

[17] *Id.* at 656.

> to such motions are usually freely granted, and it may be an abuse of discretion for the trial court to refuse to grant reasonable extensions."[18]

Our view is that the facts and circumstances of this case represent that "unusual situation[] where no possible prejudice could have resulted from a premature hearing." In the instant case, (1) both Onwu and ARH filed motions for summary judgment nearly a year prior to the February 2004 motions, both based on the same ground that Turner had failed to identify his expert witnesses; (2) Onwu's timely motion was adopted by ARH; (3) Turner, while objecting to the lack of ARH's compliance with the ten-day notice requirement, did not request a continuance of the hearing in order to correct his deficiency, i.e., to identify an expert witness as to ARH's standard of care and breach of duty; and (4) in his motion to vacate, Turner still failed to identify an expert to address ARH's standard of care and breach of duty. Under the unusual facts and circumstances of this case, the trial court did not err in proceeding to rule on ARH's motion for summary judgment, notwithstanding ARH's giving nine days' notice instead of the ten-day notice required by the rule.

One further complaint raised by Turner is that ARH failed to provide "legible" copies of its records and x-rays

[18] *See* 7 Bertelsman and Philipps, Kentucky Practice, CR 56.03, cmt. 3 (4th ed.) (the same quotation appears in the 5th edition of the treatise).

until November 2003. The record, however, discloses that medical records in fact were turned over to Turner early in the proceedings. Turner was subsequently subjected to (a) three simultaneous motions to dismiss for failure to prosecute in June 2002, (b) the entry of the trial court's August 2002 discovery scheduling order, and (c) two motions for summary judgment filed in March 2003 for failure to identify experts. Not until the "stay period," necessitated by the insolvency of ARH's insurer, did Turner express any objection as to the quality or quantity of the records that had been produced. At best, this issue appears to be a smoke screen to hide Turner's failure to identify expert witnesses under CR 26.02(4).

The judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

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