

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002195-MR

BERENDA BURNS-MAHANES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-004848

THOMAS LOEB, M.D.

APPELLEE

OPINION
REVERSING IN PART, VACATING
IN PART, AND REMANDING

** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Berenda Burns-Mahanes appeals from the Jefferson Circuit Court's dismissal of her medical negligence action filed against Thomas Loeb, M.D. Having determined that the circuit court abused its discretion in denying her motion to withdraw admissions and for additional time to respond to discovery requests and the motion for summary judgment, and

¹ Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

therefore erred in granting the motion for summary judgment, we reverse in part, vacate in part, and remand.

Burns-Mahanes, proceeding pro se, filed a complaint on June 9, 2004, alleging that Dr. Loeb negligently treated an ankle injury she sustained in October 2002 when she fell down a stairway in a neighbor's home. Dr. Loeb, through counsel, filed his answer on June 24 and served discovery requests on Burns-Mahanes the same day, including twenty-seven Interrogatories, eleven Requests for Production of Documents, and four Requests for Admissions, which read as follows:

REQUEST NO. 1: Admit that the Defendant, Thomas Loeb, M.D., was not negligent in the care and treatment of Plaintiff, Berenda Burns-Mahanes.

REQUEST NO. 2: Admit that there was no act and/or admission by Defendant, Thomas Loeb, M.D., that caused any injury and/or damages to Plaintiff, Berenda Burns-Mahanes.

REQUEST NO. 3: Admit that the treatment rendered by Defendant, Thomas Loeb, M.D., to Berenda Burns-Mahanes was reasonable and appropriate.

REQUEST NO. 4: Admit that Plaintiff, Berenda Burns-Mahanes, did not consult any medical care provider who was critical of Defendant, Thomas Loeb, M.D., prior to filing suit against Dr. Loeb.

When she failed to respond within thirty days, Dr. Loeb filed a motion for summary judgment on July 29, 2004, five days after the expiration of the response time. In the motion, Dr. Loeb

argued that the Requests for Admission were deemed admitted pursuant to CR 36.01(2), which meant that Burns-Mahanes had admitted that Dr. Loeb was not negligent, that he had not caused her injury, and that the treatment he provided her was reasonable and appropriate. Based upon these admissions, Dr. Loeb asserted that Burns-Mahanes could not maintain a claim for medical negligence, that there were no genuine issues of material fact to be resolved, and that the entry of summary judgment was appropriate. Burns-Mahanes failed to respond to this motion within the twenty days allotted by the Rules, and Dr. Loeb promptly filed a Notice of Submission, which the circuit court entered on August 25, 2004.

On September 3, 2004, Burns-Mahanes, still proceeding pro se, filed a motion for enlargement of sixty days to respond to Dr. Loeb's discovery requests and to hold the summary judgment motion in abeyance until discovery could be obtained. In her motion, Burns-Mahanes indicated that she filed the matter without an attorney to avoid a statute of limitations defense but was currently seeking counsel, and that her father became ill shortly after she filed suit and passed away on July 19, leaving her unable to focus on her case. Although Dr. Loeb did not file a written response, the circuit court denied the motion on September 7, 2004. The following day, newly retained counsel for Burns-Mahanes filed another motion for enlargement of time

to file the discovery responses, to allow for the withdrawal of the requests deemed admitted, and to hold the summary judgment motion in abeyance pending discovery. While Dr. Loeb again did not file a written response, the circuit court denied the motion on September 21, 2004, indicating on the order that Dr. Loeb had objected.² The same day, the circuit court entered the following Order ruling on Dr. Loeb's motion for summary judgment:

Upon Motion by the Defendant, Thomas Loeb, M.D., and the Court being otherwise sufficiently advised;

Defendant's Motion for Summary Judgment is hereby GRANTED. There is no genuine issue of material fact to be resolved, and thus, Defendant is entitled to summary judgment as a matter of law pursuant to CR 56. Plaintiff has admitted that Defendant, Thomas Loeb, M.D., was not negligent, which is an admission by itself that is fatal to Plaintiff's case. Accordingly, any and all claims asserted or that could have been asserted by Plaintiff, Berenda Burns-Mahanes, against Defendant, Thomas Loeb, M.D., are hereby dismissed with prejudice.

There being no just cause for delay, this is a final and appealable Order.

It is from these two orders that Burns-Mahanes has taken the present appeal.

In the first line of her brief, Burns-Mahanes states that, "[t]his is a case of a pro se litigant with extraordinary circumstances being taken advantage of by experienced counsel

² We assume Dr. Loeb objected during motion hour when the motion was called, but no videotaped recordings of any motions hours were included in the certified record.

and the judicial system.” Burns-Mahanes maintains that the circuit court abused its discretion in denying her motion for an additional sixty days to respond to the discovery requests and to the motion for summary judgment after discovery had been obtained, as well as to withdraw the deemed answers to the requests for admission. Furthermore, she asserts that the circuit court erred in granting a summary judgment as the motion should have been held in abeyance and because several of the requests for admission were improper. On the other hand, Dr. Loeb argues that Burns-Mahanes’ contention is “preposterous” and that her appeal is an attempt to avoid the natural consequences of her failure to properly and timely prosecute her case. He maintains that the circuit court did not abuse its discretion in denying her motion and properly granted his motion for summary judgment.

We shall first address the circuit court’s denial of Burns-Mahanes’ motion to withdraw the deemed admissions. Our standard of review in such matters is whether the circuit court abused its discretion.³ In Commonwealth v. English,⁴ the Supreme Court of Kentucky defined the test for abuse of discretion as “whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” Earlier, in

³ Lewis v. Kenady, 894 S.W.2d 619 (Ky. 1994); Harris v. Stewart, 981 S.W.2d 122 (Ky.App. 1998).

⁴ 993 S.W.2d 941, 945 (Ky. 1999).

Kuprion v. Fitzgerald,⁵ the same court stated, “[a]buse of discretion in relation to the exercise of judicial power implies arbitrary action of capricious disposition under the circumstances, at least an unreasonable and unfair decision.”

CR 36 details the procedure for obtaining requests for admission. Pursuant to CR 36.01, “[t]he matter is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter.” CR 36.02 provides:

Any matter admitted under Rule 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

Because Kentucky’s CR 36.02 is substantially the same as its federal counterpart, FRCP 36(b), we may look to federal cases for guidance in this area. In FDIC v. Prusia,⁶ the 8th Circuit Court of Appeals reviewed the denial of a motion to amend admissions under an abuse of discretion standard, and indicated that “Rule 36(b) directs the court to consider the

⁵ 888 S.W.2d 679, 684 (Ky. 1994).

⁶ 18 F.3d 637 (8th Cir. 1994).

'effect upon the litigation and prejudice to the resisting party[,]'. . . rather than focusing on the moving party's excuses for an erroneous admission."⁷

In Prusia, the court initially looked to the first prong of the test, which addresses whether the presentation of the merits would have been subverted by allowing the admission to stand. In that case, the court determined that, "[b]ecause allowing the erroneous admission to stand might have barred the FDIC's claim, permitting the amendment would have subverted (sic) the presentation of the merits."⁸ In U.S. v. \$30,354.00 in United States Currency,⁹ the District Court for the Western District of Kentucky stated: "Deciding dispositive issues against a party because of a missed deadline does not further the interests of justice. In the matter before this Court, the admissions requested go to the heart of the case, and accordingly should be decided upon a complete trial." In the present case, not permitting Burns-Mahanes to withdraw the admissions clearly subverted this action, as the affect of the denial of her motion caused her case to be dismissed by summary judgment. Three of the four admissions went directly to the heart of the case, requesting admissions as to whether Dr. Loeb was negligent in his care and treatment, whether he caused any

⁷ Id. at 640. (Citations omitted.)

⁸ Id.

⁹ 863 F.Supp. 442 (W.D.Ky. 1994).

injury or damages, or whether his treatment was reasonable and appropriate. Once those statements were deemed admitted, Burns-Mahanes could not prove a *prima facie* case of medical negligence. Therefore, Burns-Mahanes' claim would not be served or promoted if she were not permitted to withdraw the admissions.

Regarding the prejudice prong, the Prusia court stated:

The prejudice contemplated by Rule 36(b) "'relates to the difficulty a party may face in proving its case' because of the sudden need to obtain evidence required to prove the matter that had been admitted." Gutting v. Falstaff Brewing Corp., 710 F.2d 1309, 1314 (8th Cir. 1983)(quoting Brook Village N. Assocs. v. General Elec. Co., 686 F.2d 66, 70 (1st Cir. 1982)). The necessity of having to convince the trier of fact of the truth of a matter erroneously admitted is not sufficient.¹⁰

Furthermore, the burden is on the party who obtained the admission to establish prejudice.¹¹ In the present matter, we cannot hold that Dr. Loeb established that he was prejudiced as contemplated by the Rule. The record only reflects that Dr. Loeb objected to the motion, but not the grounds for the objection as he did not file a written response and the videotape of the motion hour was not certified and included in

¹⁰ Prusia, 18 F.2d at 630. See also Kerry Steel, Inc. v. Paragon Industries, Inc., 106 F.3d 147, 154 (6th Cir. 1997).

¹¹ Prusia, 18 F.2d at 630.

the record on appeal. In footnote 9 of his brief, however, Dr. Loeb addressed the issue of prejudice:

Although immaterial, it is worth noting that Dr. Loeb would definitely have been prejudiced in the defense of his case if the trial court were to have permitted withdrawal. As discussed in a later section of this Brief, matters admitted under CR 36 are treated as judicial admissions. It cannot reasonably be argued that there would be no prejudice to taking away a judicial admission on which a party defending a lawsuit can rely to establish the absence of liability and/or damages. Allowing withdrawal of the admissions made by Ms. Burns-Mahanes would require Dr. Loeb to conduct extensive discovery and endure the expense of retaining expert witnesses all to disprove the allegations of negligence which Ms. Burns-Mahanes had admitted were untrue. Thus, prejudice to Dr. Loeb would most certainly have occurred.

It is clear that Dr. Loeb has misperceived the "prejudice" contemplated in the Rule and related case law, and has therefore not met his burden of establishing prejudice. Dr. Loeb's claimed prejudice goes to his need to expend money and time to establish a defense. He does not argue that the delay has "resulted in any prejudice to the presentation of his case."¹² The case was dismissed less than four months from the date it was filed, and no discovery had taken place, other than the unanswered requests propounded by Dr. Loeb. No pre-trial hearings or trial dates had been scheduled, so the motion did

¹² Harris, 981 S.W.2d at 125.

not come on the eve of trial when Dr. Loeb would have no opportunity, or a reduced opportunity, to present a defense to the new issues created by the withdrawn admissions.

While we have determined that Burns-Mahanes met CR 36.02's test for the withdrawal of the admissions, the decision whether to allow a party to withdraw an admission is still left to the sound discretion of the court. In this case, the circuit court's decision to deny Burns-Mahanes' motion appears to be both unfair and unreasonable under the circumstances of the case. The denial caused the case to be dismissed and the withdrawal of the admissions is not prejudicial to Dr. Loeb within the meaning of the Rule. Furthermore, while not truly applicable to our consideration, Burns-Mahanes presented compelling reasons for her lack of response, including the sickness and death of her father and her ankle surgery, all occurring shortly after the filing of her lawsuit. For these reasons, we hold that the circuit court abused its discretion in denying the motion to withdraw the admissions. Accordingly, we reverse this ruling. Upon remand, the circuit court shall also provide Burns-Mahanes additional time to file her discovery responses as she has established excusable neglect under CR 6.02.

Burns-Mahanes next argues that the circuit court erred in granting summary judgment, thereby dismissing her claim.

"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."¹³ The crux of her argument is that the circuit court relied upon improper requests for admissions in granting summary judgment. She claims that these requests for admission were improper in that they dealt with the central issue in the case. We agree with Dr. Loeb that Burns-Mahanes may not raise this particular portion of her argument before this Court as it was not raised below.

However, in light of our ruling on Burns-Mahanes' first argument, the basis for the entry of the summary judgment is no longer valid, as the admissions concerning Dr. Loeb's negligence, his treatment of her injury, and whether he caused her any injury or damage must be withdrawn. Therefore, the circuit court's summary judgment must be vacated.

For the foregoing reasons, the Jefferson Circuit Court's order related to the denial of the motion to withdraw the admissions is reversed, the order granting summary judgment is vacated, and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

¹³ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

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