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SUPREME COURT GRANTED DISCRETIONARY REVIEW:  
FEBRAURY 13, 2008  
(2007-SC-0389-DG & 2007-SC-0414-DG)

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2006-CA-000585-MR

MELANIE PEARSON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE  
ACTION NO. 05-CI-002182

NORTON HOSPITAL, INC.; ROBERT  
SOLINGER, M.D.; CHRISTOPHER  
JOHNSRUDE, M.D.; MICHAEL  
RECTO, M.D.; and PEDIATRIC  
CARDIOLOGY ASSOCIATES, P.S.C.

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; HENRY,<sup>1</sup> SENIOR JUDGE.

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<sup>1</sup> Senior Judge Michael L. Henry sitting as special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

HENRY, SENIOR JUDGE: Melanie Pearson appeals from the summary judgment dismissing her medical malpractice action against Norton Hospital, Inc.; Dr. Robert Solinger, Dr. Christopher Johnsrude, Dr. Michael Recto, and the doctors' medical practice, Pediatric Cardiology Associates, P.S.C. Ms. Pearson asserts that the trial court erred in summarily concluding that the appellees were entitled to judgment as a matter of law. We agree; therefore, we vacate and remand.

On March 7, 2005, Pearson, proceeding *pro se*, filed a complaint alleging that Drs. Solinger, Johnsrude, and Recto; and Pediatric Cardiology Associates ("doctors") treated her for several years for various medical conditions including "mitral valve prolapse, mitral regurgitation, tricuspid valve prolapse, tricuspid regurgitation, aortic sufficiency [and] atrial fibrillation." She claimed that she developed Coumadin toxicity after being prescribed Coumadin, an anticoagulation medication, in an excessive dose during an emergency admission at Norton Hospital in February 2004. She further claimed that as a result of the defendants' care, she developed a cerebral aneurysm and damage to her central nervous system, heart, lungs and brain. She also alleged a claim for emotional distress.

Both Norton Hospital and the doctors promptly initiated discovery and filed motions to dismiss based on the expiration of the statute of limitations. Pearson timely filed her response to Norton Hospital's motion to dismiss and was granted an extension of time to file her response to the doctors' motion to dismiss. Pearson's *pro se* responses to the motions to dismiss were each supported by her affidavit detailing her medical history. The trial court denied the motions to dismiss.

Norton Hospital and the doctors sought specific information about Pearson's anticipated expert witnesses shortly after the complaint was filed. In its interrogatories served on March 22, 2005, Norton Hospital sought the name of every person stating that its act or omission constituted negligence or a deviation from the proper standard of care. On April 7, the doctors served their request for admissions relating to any expert witness, and on April 20 the doctors served their first set of interrogatories and request for production of documents requesting specific information about any anticipated expert witness.

Pearson requested extensions of time to answer the discovery requests on the basis of her ill health and her recent open heart surgery. The trial court initially granted Pearson an extension until May 15, 2005. That date passed without Pearson's responding to the discovery requests. Norton Hospital and the doctors filed motions for summary judgment on May 20 and May 23, respectively, asserting that the request for admissions was deemed admitted pursuant to CR 36 by Pearson's failing to respond, and that as a matter of law, Pearson was unable to establish a deviation from the accepted standard of care. By separate orders entered on June 15, the trial court granted Pearson an extension until June 30 to respond to the outstanding discovery requests. In her June 20 response to the motions for summary judgment, Pearson stated that she "retained a medical expert which supports her contentions in the matter, is attempting to obtain additional medical experts and will be relying upon the medical records . . . and testimony from her treating physician . . . ." Pearson did not provide the names or opinions of any expert in her response. Stating that she had been critically ill, Pearson requested an additional 120 days to respond to discovery requests and to conduct her discovery.

Norton Hospital filed a reply to Pearson's response, clarifying that its motion for summary judgment was based upon Pearson's failing to respond to its request for admissions, to timely file her complaint, and to support her claims with expert testimony. On July 22, 2005, Pearson filed a status conference brief. Pearson refuted that she had no expert, stating that "the case is barely four months old, Plaintiff has consulted with experts and will be supporting her claim with at least two experts and possibly more."

At a hearing on July 27, 2005, Pearson stated that she consulted with an expert and needed to furnish him with her medical records. After the hearing, the trial court entered a civil jury trial order setting the trial for April 25, 2006, and the expert disclosure dates as October 1, 2005, for Pearson and December 1, 2005, for Norton Hospital and the doctors. Thereafter, Pearson sought to block certain discovery requests, at one point filing with this court a petition for writ of prohibition. The petition was denied as moot on October 6, 2005, after Norton Hospital amended its discovery requests.

On October 3, 2005, Pearson sought additional time to disclose her expert witnesses, claiming that financial hardship prevented her from obtaining all necessary experts. She stated that "she retained an anticoagulation expert and has made arrangements to obtain a neurologist (she is just waiting to obtain the funds), both of which have indicated, based upon information supplied by Plaintiff, that the Defendants were negligent in the care and treatment of Plaintiff's medical conditions." At an October 11, 2005, hearing, the trial court cautioned that an expert was needed and granted Pearson an extension to December 1, 2005, to disclose the identity of her experts and the substance of their opinions.

On December 7, 2005, Norton Hospital filed a motion for ruling on its previously filed motion for summary judgment, asserting that Pearson failed to support her medical negligence claims with expert testimony. Norton Hospital stated that Pearson filed her complaint on March 7, 2005; that pursuant to the July 27 trial order, she should have identified her experts by October 1, 2005; and that she was granted an extension to December 1, but Pearson did not meet that deadline. Norton Hospital asserted that it could not conduct its discovery and that dismissal was appropriate based on the lack of an expert. On December 12, the doctors also filed a motion for ruling on its motion for summary judgment, asserting that Pearson had yet to identify any experts and did not request an extension of her latest deadline on December 1. The doctors also sought dismissal of the action for failure to disclose experts. Pearson did not appear at a December 9, 2005, status conference.

On December 12, 2005, the trial court entered a summary judgment dismissing the complaint. The trial court found that expert testimony was required and that "Plaintiff is unable to sustain her burden of proof against any of the Defendants without competent expert testimony. Plaintiff has not complied with the Trial Order as she has not identified any experts, nor supplied CR 26.02 information. As such, there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law." Two days later on December 14, Pearson filed a letter with the court and explained that she did not attend the December 9 status conference because she was seeking treatment at a hospital for severe chest pains at that time. Pearson, still proceeding *pro se*, filed a motion to vacate the summary judgment on December 22, 2005. Shortly thereafter Pearson retained an attorney, and on January 17, 2006, she requested leave to file expert

witness disclosures and tendered the disclosures. After the parties filed their responses and reply, the court held a hearing on the motion to vacate. On February 24, 2006, the trial court entered its order denying Pearson's motion to vacate the summary judgment, finding that "[t]he deadlines set by the Court were simply not met by Plaintiff, despite numerous (and never denied) extensions of time. She could not sustain her burden." The trial court also denied Pearson's motion to file her expert witness disclosure, finding that the "documents come some 36 days after final judgment was entered and are not relevant to the motion to vacate." This appeal followed the denial of Pearson's motion to vacate the summary judgment.

The standard of review 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "is to be cautiously applied . . . especially in actions involving allegations of negligence." *Poe v. Rice*, 706 S.W.2d 5, 6 (Ky.App. 1986) (citations omitted). Summary judgment "is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Although the record does not establish the existence of a genuine issue of material fact, summary judgment is prematurely granted when the record does not establish the non-existence of a genuine issue of material fact. *Barton v. Gas Service Co.*, 423 S.W.2d 902, 904 (Ky. 1968). We review the record in a light most favorable to the party opposing the motion for summary judgment and resolve all doubts in her favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is not appropriate "to resolve what is essentially a procedural dispute as to the need for an expert, the disclosure of the expert's identity, and the substance of the testimony. In such disputes, it is within the trial court's discretion to impose sanctions for failure to comply rather than to grant a summary judgment as a procedural sanction except in rare cases." *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 681-82 (Ky. 2005). In *Ward v. Housman*, 809 S.W.2d 717, 719 (Ky.App. 1991), the trial court prevented the plaintiff in a medical malpractice action from using essential expert "testimony as a sanctioning technique for the dilatory conduct of the [plaintiff's] counsel," and thereafter entered summary judgment dismissing the action. On appeal, the dismissal was treated as a CR 41.02(1) involuntary dismissal for failure to prosecute or to comply with any court order. The court in *Ward* adopted a six-factor analysis for determining whether a case should be involuntarily dismissed: "1) the extent of the party's personal responsibility; 2) the history of dilatoriness; 3) whether the attorney's conduct was willful and in bad faith; 4) meritoriousness of the claim; 5) prejudice to the other party; and 6) alternative sanctions." 809 S.W.2d at 719. The responsibility to make findings on the *Ward* factors before dismissing a case with prejudice "falls solely upon the trial court." *Toler v. Rapid American*, 190 S.W.3d 348, 351 (Ky.App. 2006).

The summary judgment and the order denying the motion to vacate clearly demonstrate that the trial court was sanctioning Pearson for failing to adhere to its deadline for disclosing her expert witnesses. This is not a case where the plaintiff ignored the action after filing the complaint or refused to obtain an expert; instead, throughout the nine-month litigation, Pearson claimed that she was attempting to secure

experts but was impeded by her illnesses, hospitalizations, and lack of funds. The doctors and Norton Hospital had the burden of demonstrating the non-existence of a genuine issue of material fact. *See Barton*, 423 S.W.2d 902. The appellees moved for summary judgment on Pearson's failing to make her expert witness disclosures and did not aver it was impossible for Pearson to obtain expert testimony. The trial court recounted Pearson's requests for extension in its order denying the motion to vacate. However, the trial court did not make findings whether Pearson acted willfully or in bad faith in seeking the extensions or whether it considered any less drastic sanctions other than dismissal. *Cf. Greathouse v. American Nat'l Bank and Trust Co.*, 796 S.W.2d 868 (Ky.App. 1990). After reviewing the record in a light most favorable to Pearson, resolving all doubts in her favor, we conclude that the appellees did not meet their burden of demonstrating the non-existence of any genuine issue of material fact. Summary judgment was prematurely granted.

Further, treating the summary judgment as an involuntary dismissal, it does not appear that the trial court considered the factors in *Ward v. Housman*. On remand, the trial court should reconsider its dismissal in light of the factors enumerated in *Ward*.

Pearson contends that the trial court abused its discretion by requiring expert testimony. She asserts that the doctrine of *res ipsa loquitur* applies. We disagree that the trial court abused its discretion in this regard.

In a medical malpractice case, expert testimony is generally required to establish standard of care, breach of that standard, and causation. *Blair v. Eblen*, 461 S.W.2d 370, 373 (Ky. 1970). Two exceptions to the requirement of expert testimony are



recognized. These two exceptions were recently summarized in *Andrew v. Begley*, 203

S.W.3d 165, 170-71 (Ky.App. 2006):

One exception involves a situation in which "any layman is competent to pass judgment and conclude from common experience that such things do not happen if there has been proper skill and care"; illustrated by cases where the surgeon leaves a foreign object in the body or removes or injures an inappropriate part of the anatomy. The second occurs when "medical experts may provide a sufficient foundation for *res ipsa loquitur* on more complex matters." [*Perkins v. Hausladen*, 828 S.W.2d 652,] 655 (Ky. 1992) (quoting Prosser and Keeton on Torts, Sec. 39 (5th ed. 1984)). An example of the second exception would be the case in which the defendant doctor makes admissions of a technical character from which one could infer that he or she acted negligently. *See id.*

Pearson's medical history was quite complex prior to the alleged February 2004 overdose of Coumadin, and the standard of care relating to the administration of an anticoagulation drug is not within the common knowledge of jurors. The trial court did not abuse its discretion in determining that *res ipsa loquitur* was not applicable in this case. *See Baptist Healthcare v. Miller*, 177 S.W.3d at 680-81.

For the reasons stated herein, the summary judgment is vacated, and this action is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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