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DISCRETIONARY REVIEW GRANTED BY SUPREME COURT: SEPTEMBER 10, 2008
(FILE NO. 2007-SC-000916-D & 2007-SC-000921-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001612-MR

HORACE COLLIER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 05-CI-01583

CARITAS HEALTH SERVICES, INC. D/B/A/ CARITAS MEDICAL CENTER; ROBERT M. BLANKENSHIP, M.D.; AND UNKNOWN DEFENDANTS — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

MOORE, JUDGE: Horace Collier appeals the Jefferson Circuit Court's order granting motions for summary judgment brought by Appellees Caritas Health Services,

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

Incorporated and Robert M. Blankenship, M.D. After a careful review of the record, we vacate the circuit court's order and remand this case for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 17, 2004, Mr. Collier was admitted to Caritas after complaining of abdominal pain. The next day, after having tests conducted and consulting with Dr. Blankenship, Mr. Collier had surgery, specifically, an appendectomy. Mr. Collier was released to return home on February 23, 2004.

On February 17, 2005, Mr. Collier filed his complaint in the circuit court, alleging that after he was admitted to Caritas, he was not re-evaluated or treated in a timely manner. He contended that, as a result of Appellees' negligence, he "sustained permanent physical and mental injuries, . . . suffer[ed] prolonged pain and mental anguish, had his power to labor and earn money impaired and . . . incurred medical expense[s] and will [continue to do] so in the future, all to his damage and detriment . . . ." (Complaint, ¶¶ 10, 12).

The circuit court entered a Civil Jury Trial Order setting the deadline for disclosure of Mr. Collier's expert witnesses for January 30, 2006, and a jury trial for October 10, 2006. Mr. Collier failed to meet the expert witness deadline and on February 2, 2006, a hearing was held wherein Mr. Collier requested an extension through February 28, 2006, to identify expert witnesses. This motion was granted, but Mr. Collier still failed to disclose an expert witness.

Although the trial date was not scheduled until October of 2006, within a couple of weeks of the passage of the expert disclosure deadline, Appellees filed separate

motions for summary judgment on the basis that Mr. Collier had not timely disclosed his expert witnesses or the substance of expert testimony. In essence, both Appellees filed motions for summary judgment arguing that Mr. Collier could not meet his prima facie case of negligence absent expert proof that their treatment of Mr. Collier failed to meet the required standard of care of medical professionals.

Mr. Collier opposed the motions for summary judgment arguing that summary judgment was inappropriate where the issue was one of failure to timely disclose an expert. He also questioned in his response to Caritas' motion whether an expert was necessary and that there was at least an issue to be resolved by the circuit court regarding this.

Upon review, the circuit court granted Appellees' motions. In doing so, the court found that an expert was needed to testify concerning whether the delay in treating Mr. Collier caused his permanent injuries. The trial court stated that

> [t]he Plaintiff has been instructed by this Court to demonstrate such expert testimony is available, such that a causation between Defendants' acts and Plaintiff's injuries is at least *possible*.[2] Since Plaintiff has failed to identify and disclose any expert witness, summary judgment, as a matter of law, is appropriate in favor of Caritas and Dr. Blankenship.

Mr. Collier appeals, raising the following claims: (1) the circuit court erred and abused its discretion when it used CR 56 summary judgment 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 expert's testimony, rather than impose sanctions for failure to comply with the pre-trial order regarding the disclosure of expert witnesses; and

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[2] A search of the record reveals no such written instruction or an order regarding whether the trial court had made a decision that this case required expert testimony prior to the submission of motions for summary judgment.

(2) summary judgment was improper and is not a trick device to prematurely terminate litigation.

II. ANALYSIS

Because we find that Mr. Collier's two claims on appeal are interrelated, we discuss them together. Regarding expert disclosures, the circuit court's Civil Jury Trial Order provided that

> 16. **Expert Disclosure.** With reference to expert witnesses, if proper request has been made therefor, **counsel for the Plaintiff shall furnish such information on or before January 30, 2006 and counsel for defense shall furnish such information on or before March 30, 2006.** There must be a literal compliance with the requirements of CR 26.02(4)(a)(i). A party must identify each person whom the party expects to call as an expert witness at trial, and state the substance of the fact and opinions to which the expert is expected to testify and a summary of the grounds of each opinion. Failure to comply with the letter and spirit of the aforesaid civil rule may result in the suppression of the expert's testimony. To the extent a physician's testimony is limited to opinions developed while treating the Plaintiff (diagnosis, causation, treatment, permanency), no expert disclosure is required. The treating physician's anticipated testimony shall be provided in accordance with Paragraph 4 of this Order.
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> 17. Full and complete compliance with this order is mandatory. Failure to so comply may result in reassignment of the trial date and/or waiver of objections, etc., and/or sanctions in regard to attorney fees and costs resulting from noncompliance. The Court may further limit/deny testimony of witnesses, introduction of exhibits, introduction of damages, evidence of defenses, etc., resulting from noncompliance.

Despite the unambiguous order and stern warning therein given by the circuit court concerning expert disclosures, Mr. Collier requested and was granted, an extension of time for his expert disclosures. Mr. Collier, however, was not sanctioned by

the court for his tardiness. And, despite the fact that he failed to name any experts within the given time limits, Appellees did not seek sanctions for his failure to comply with the court's order nor did they request that the court compel Mr. Collier to comply with the pre-trial order regarding disclosure of expert witnesses.

Within a couple of weeks after the time expired for expert disclosures, without having filed a motion to compel and/or for sanctions, Appellees respectively filed motions for summary judgment in March based on Mr. Collier's failure to disclose any experts. At this time the trial was scheduled for October of 2006, over seven months away.

The foundation for both motions for summary judgment was that in medical malpractice cases such as the one at bar, expert testimony is required to make a prima facie case. Because Mr. Collier had not yet disclosed an expert within the time alloted by the court, Appellees argued that summary judgment was appropriate.

In his separate responses to these motions, Mr. Collier relied heavily on *Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676 (Ky. 2005), arguing that summary judgment was an inappropriate mechanism for relief when a plaintiff has failed to name an expert within the time alloted by the court. Additionally, he argued that his case against Caritas may be a case where expert testimony is not necessary. Nonetheless, he later argued that "[u]nder these circumstances, there is a serious question as to whether expert testimony is needed to establish the claims against Caritas."

Appellees are correct that in most medical malpractice cases, expert testimony is a necessary element of the plaintiff's case. It is well established that in a medical malpractice case, the burden of proof is upon the plaintiff to establish the

negligence of a physician by medical or expert testimony. *Morris v. Hoffman*, 551 S.W.2d 8, 9 (Ky. App. 1977). Kentucky recognizes two exceptions to this requirement, both of which permit the inference of negligence even in the absence of expert testimony. *See Perkins v. Hausladen*, 828 S.W.2d 652, 654-55 (Ky. 1992). Expert testimony is not required if "'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.'" *Id.* at 655 (quoting *Prosser & Keeton, on the Law of Torts*, §39 (5th ed. 1984)). Regarding the second exception, if the defendant physician makes admissions of a technical character from which the jury can infer that he acted negligently, a plaintiff would not have to present expert testimony. *Id.* A "trial court's ruling with regard to the necessity of an expert witness [is] within the court's sound discretion." *Baptist Healthcare Sys., Inc.*, 177 S.W.3d at 681.

In its opinion granting summary judgment to both Appellees, the trial court noted that "Plaintiff has been instructed by this Court to demonstrate that ... expert testimony is available, such that causation between Defendants' acts and Plaintiff's injuries is at least *possible*." A search of the record reveals no such written instruction or an order regarding whether the trial court had made a decision that this case required expert testimony. As a general rule, courts speak only through written, signed, and entered orders. *See Midland Guardian Acceptance Corp. of Cincinnati, Ohio v. Britt*, 439 S.W.2d 313, 314 (Ky. 1968). Summary judgment was entered on July 7, 2006, for Mr. Collier's failure to meet the February 28, 2006, expert witness disclosure deadline, although the trial date was not scheduled until October 10, 2006.

In *Baptist Healthcare Systems*, the defendants filed for summary judgment within three weeks of the trial date based on plaintiff's failure to name an expert witness to prove medical malpractice. Rather than grant the summary judgment motion, the court, *after a hearing on the issue*, made a determination that an expert was needed and granted the plaintiff thirty days to name an expert. This required the trial court to continue the trial date. The trial court informed the plaintiff that if she failed to name an expert in the time given, dismissal would be granted. The Kentucky Supreme Court noted that "the trial court properly exercised its discretion to announce a ruling on the necessity of an expert witness and to grant [plaintiff] a reasonable time in which to procure an expert." *Baptist Healthcare Sys., Inc.*, 177 S.W.3d at 681. The Court then found that, "[u]nder these circumstances, not only did the trial court *not* err in failing to grant summary judgment, to have done so would have been *extraordinary*." *Id*. (emphasis added). The Court continued, holding that

> [i]t is inappropriate to use a CR 56 summary judgment 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.

Id. 681-82.

We find the procedure used in *Baptist Healthcare Systems* binding in answering the question before us. Before deciding on summary judgment motions in medical malpractice cases, a court should make a ruling whether an expert is necessary and give the plaintiff reasonable time to secure an expert.[3]

[3] Certainly, the better and ethical route is for plaintiffs to timely comply with pre-trial orders and CR 26.02(4)(a)(i). However, as a general rule, and as will be explained *infra*, sanctions or an involuntary dismissal, not summary judgment, are proper alternatives for a court to take when

We believe that this conclusion is compelled by the fact that the Court in *Baptist Healthcare Systems* relied on *Poe v. Rice*, 706 S.W.2d 5 (Ky. App. 1986). *Poe* was a medical malpractice case, wherein summary judgment was granted because the plaintiffs failed to meet their burden of producing expert testimony that doctors were negligent in failing to diagnose the decedent's breast cancer. On review, our Court reversed, determining that

> [f]rom the face of the judgment, it is readily apparent that the lower court has erroneously attempted to substitute the summary judgment standard of CR 56.03 for the procedures of CR 37.02 and CR 37.01. Nowhere in the language of the March 27, 1985 summary judgment are we able to locate a finding that there is no genuine issue of material fact. Instead the trial court concentrates upon the appellants' supposed failure to produce expert testimony concerning the defendants' alleged negligence.
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> This argument ignores the fact that appellants repeatedly objected to producing such witnesses in their response to interrogatories, while maintaining their existence. At no time did the appellees move the trial court to compel discovery pursuant to CR 37.01(b)(i). Nor did the lower court ever enter an order requiring the plaintiffs to respond to defendant appellees' interrogatories regarding such witnesses. In essence then, the court below has improperly attempted to resolve an essentially procedural conflict arising from discovery with a rule founded upon the resolution of legal issues arising upon undisputed facts. This it cannot do.
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> Case law in our jurisdiction is manifest that summary judgment is to be cautiously applied, *Hollins v. Edmonds*, Ky.App., 616 S.W.2d 801 (1981), especially in actions involving allegations of negligence. *Hill v. Alvey*, Ky., 558 S.W.2d 613 (1977). All doubts are to be resolved in the nonmovants' favor, *Rowland v. Miller's Adm'r.*, Ky., 307 S.W.2d 3 (1956). Only where all the evidence, viewed in a light most favorable to the opposing party, manifestly reveals that no genuine issues of material fact exist and that the movant is entitled to judgment as a matter of law, may summary judgment be properly granted. Such is not the case

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the litigation is not at the eve of trial.

> in the present appeal which has more of the flavor of a dismissal for failure to prosecute than a summary judgment.

Id. at 6 (emphasis added).

In the case at bar, the trial court included language in its order granting summary judgment regarding whether a genuine issue of material fact existed. But, this language is general in nature and did not go to the merits. The merits of the case are not argued in the motions. In fact, the motions and opinion never went beyond whether Mr. Collier had named an expert by the disclosure deadline. Thus, it is apparent that the holding is based solely on Mr. Collier's failure to name an expert. This finding is illustrated by the circuit court's statement that "Plaintiff, however, argues that summary judgment is not appropriate if dismissal is based solely on Plaintiff's failure to obtain an expert witness. The Court disagrees."

Notwithstanding the trial court's statement that it had instructed Appellant that a medical expert was necessary to prove at least that there was a possible causation connection between the Appellees' actions and Appellant's injuries, no written order of this can be found in the record. This is always a difficult position for an appellate court, but we hold firm to the general rule that a court speaks through its written orders only.

We also conclude that the record compels us to vacate summary judgment in this matter. Pursuant to CR 56.03, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In Mr. Collier's answers to Dr. Blankenship's requests for admissions regarding expert witnesses, Mr. Collier responded on April 8, 2005, that "[t]he expert witness(es) who <u>will</u> testify has/have not

been determined. Once such is done, the Plaintiff will provide the requested information in accordance with CR 26." (Emphasis in original).

In Dr. Blankenship's interrogatories to Mr. Collier filed with the circuit court on August 23, 2005, he asked whether "any physicians indicated to you or your attorney that this defendant-physician deviated from the standards of good medical practice? If so, please state the name, address and specialty, if any, of each physician." In response, Mr. Collier answered "Yes. Objection to any further information as attorney work product." Next, Dr. Blankenship asked whether "any physician indicated to you or your attorneys, whom you intend to call at trial of this matter that this defendant-physician deviated from the standards of good medical practice? If so, please state the name, address and specialty, if any, of each physician." Mr. Collier answered "Yes. Objection to any further information as attorney work product." Regarding Dr. Blankenship's interrogatory as to the names of any experts, Mr. Collier answered that he and his attorney had not "yet decided upon an expert to call at this point in this litigation." This was nearly four months before the circuit court's pre-trial order was entered, nearly six months before the disclosures were due, and over fourteen months before the trial date was scheduled. Mr. Collier's answers to interrogatories and admissions, signed under oath and penalty for perjury, indicate that Mr. Collier or his attorney had spoken to at least one physician regarding standard of care but was not yet prepared (or required) to name an expert at that time. Under CR 56.03, this is sufficient to defeat summary judgment, at least at the stage in the proceedings and basis for which summary judgment was requested, i.e., failure to have named an expert over seven months before the trial date.

After the time for disclosure had passed, Mr. Collier moved for an extension to name experts, which the circuit court granted without any sanctions despite the warning for literal compliance. When Mr. Collier did not disclose an expert by February 28, Caritas moved, on March 8, 2006, for summary judgment for failure to name an expert. And, Dr. Blankenship moved on March 14, 2006, for summary judgment on the same basis.

We believe that, pursuant to *Poe* and *Baptist Healthcare Systems,* the grant of summary judgment for Mr. Collier's failure to name a witness by the end of February 28, 2006, was in error. We find that the instruction of *Baptist Healthcare Systems* is that first the court must make a determination that an expert is needed before ruling on summary judgment motions. According to *Baptist Healthcare Systems*, after that determination has been made, plaintiffs should be given a reasonable time to disclose experts. If plaintiffs fail to disclose expert witnesses in the time granted, sanctions may be appropriate. However, if plaintiffs have not disclosed their expert witnesses on the eve of trial, dismissal would be warranted. *See, e.g*., *Baptist Healthcare Systems,* 177 S.W.3d at 680.

If plaintiffs simply disregard an order to name expert witnesses, but continue to assert they have one or are in the process of obtaining an expert, then the court should engage in the test set forth in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991), wherein the trial court granted summary judgment against a party who failed to timely disclose expert witnesses in a medical malpractice case. This Court held that summary judgments are "not to be used as a sanctioning tool of the trial courts." *Id.* at 719. The Court then reasoned that the grant of summary judgment in *Ward* actually

amounted to an involuntary dismissal under CR 41.02(1). *Id*. The Court concluded that before involuntarily dismissing a case, trial courts should consider the following factors: "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." *Id*. (citation omitted).

Certainly, if a plaintiff refuses to obtain an expert, gambling on his convictions that an expert is not necessary in a medical malpractice case and decides not to call one, even after the court has determined that an expert is necessary, summary judgment is appropriate. Under this factual scenario, the plaintiff cannot meet an element of his case. *See, e.g., Green v. Owensboro Medical Health Systems, Inc.*, 231 S.W.3d 781 (Ky. App. 2007) This would not be in the same vein as sanctioning him for failure to meet a disclosure deadline. *Id*.

We further elaborate on the issues before us to note that we believe *Poe*, *Baptist Healthcare Systems* and *Ward* strongly urge sanctions as appropriate under the Civil Rules for failure to meet discovery deadlines and that under such facts, summary judgment is inappropriate. Certainly, an attorney or party would prefer a sanction as compared to dismissal of an action. When it is apparent that summary judgment has been granted as a sanction for failure of a party to meet a discovery deadline, this is an improper use of CR 56.03.

In light of *Poe, Baptist Healthcare Systems* and *Ward*, and the record, the circuit court's granting of Appellees' motions for summary judgment based on Mr. Collier's failure to disclose his expert witnesses was improper. Accordingly, the order of

the Jefferson Circuit Court is vacated, and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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