

RENDERED: JULY 31, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001645-MR

MARY JOE BUNDY EVERAGE

APPELLANT

APPEAL FROM KNOTT CIRCUIT COURT
v. HONORABLE JOHNNY RAY HARRIS, SPECIAL JUDGE
ACTION NO. 18-CI-00044

DR. KENNETH SLONE, M.D.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, LAMBERT, AND L. THOMPSON, JUDGES.

LAMBERT, JUDGE: Mary Joe Bundy Everage appeals from an order of the Knott Circuit Court granting summary judgment in favor of Dr. Kenneth Slone in a medical malpractice claim. We affirm.

Everage filed her claim against Dr. Slone in Knott Circuit Court in March 2018 (after having unsuccessfully attempted to bring a similar action in the

United States District Court, Eastern District of Kentucky). In her allegation of malpractice, Everage claimed that Slone had inappropriately prescribed to her the antipsychotic medication risperidone, which resulted, she stated, in debilitating side effects. Everage also sought damages from Slone for defamation. A special judge was appointed to hear Everage's case after the presiding Knott Circuit Court Judge disqualified herself pursuant to Kentucky Revised Statute (KRS) 26A.015(2)(d)4.

On June 8, 2018, Slone moved for summary judgment because, among other things, Everage had failed to identify a medical expert to support her claim. The circuit court initially granted Slone's motion but later granted Everage's motion for reconsideration and allowed her until October 3 of that year to identify her medical expert. Kentucky Rule of Civil Procedure (CR) 26.02(4). A hearing was held on October 5, 2018. The following week, the circuit court granted Slone's motion for summary judgment and dismissed Everage's claims. The court further ordered, *sua sponte*, that Everage have no contact with Slone's attorneys other than by means of facsimile or postal service communications. Everage appeals.

We begin by stating our standard of review, namely:

According to CR 56.02, a defendant "may, at any time, move with or without supporting affidavits for a summary judgment in his favor" Although a defendant is permitted to move for a summary judgment

at any time, this Court has cautioned trial courts not to take up these motions prematurely and to consider summary judgment motions “only after the opposing party has been given ample opportunity to complete discovery.” *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988). Thus, even though an appellate court always reviews the substance of a trial court’s summary judgment ruling *de novo*, *i.e.*, to determine whether the record reflects a genuine issue of material fact, a reviewing court must also consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling. In a medical malpractice action, where a sufficient amount of time has expired and the plaintiff has still “failed to introduce evidence sufficient to establish the respective applicable standard of care,” then the defendants are entitled to summary judgment as a matter of law. *Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d 781, 784 (Ky. App. 2007); *See also Neal v. Welker*, 426 S.W.2d 476, 479-480 (Ky. 1968). The trial court’s determination that a sufficient amount of time has passed and that it can properly take up the summary judgment motion for a ruling is reviewed for an abuse of discretion.

Blankenship v. Collier, 302 S.W.3d 665, 668 (Ky. 2010). “Expert testimony is not required, however, in *res ipsa loquitur* cases, where ‘the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant’s relation to it’, and in cases where the defendant physician makes certain admissions that make his negligence apparent.” *Id.* at 670 (citation omitted); *see also Brown v. Griffin*, 505 S.W.3d 777, 782 (Ky. App. 2016).

We have reviewed the record in its entirety and “are unable to discern any evidence supportive of [Everage’s] position that negligence and a deviation from the standard of care could be inferred by a typical juror in the absence of an expert witness to so testify.” *Brown*, 505 S.W.3d at 783. The decision whether to prescribe antipsychotic medication is simply not within a layperson’s knowledge. We find no error or abuse of discretion in the circuit court’s grant of summary judgment in Everage’s medical malpractice claim.

Likewise, the dismissal of her claim for defamation must also be affirmed. “To establish defamation, a plaintiff must prove four elements: defamatory language; about the plaintiff; which is published; and which causes injury to reputation.” *National College of Kentucky, Inc. v. WAVE Holdings, LLC*, 536 S.W.3d 218, 222 (Ky. App. 2017) (citation and footnote omitted). True statements and privileged communications are defenses to claims of defamation. *Id.* “Additional discovery would not have altered the result of the summary judgment because the statements attributed to [Slone] were either true or protected opinion.” *Id.* at 226.

We decline to address Everage’s argument regarding the limited no-contact order since it was not raised before the circuit court. “[A]n appellate court is ‘without authority to review issues not raised in or decided by the trial court.’ The proper role for an appellate court is to review for error—and there can be no

error when the issue has not been presented to the trial court for decision.” *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 852 (Ky. 2016) (footnotes omitted).

The judgment of the Knott Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mary Joe Bundy Everage, *pro se*
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BRIEF FOR APPELLEE:

Andrew DeSimone
L. Scott Miller
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