RENDERED: DECEMBER 4, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000870-MR

JEAN LUTTRELL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULZ GIBSON, JUDGE
ACTION NO. 06-CI-008007

JEWISH HOSPITAL & ST. MARY'S HEALTHCARE, INC., d/b/a FRAZIER REHAB INSTITUTE; AND DAVID SELIGSON, M.D. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Jean Luttrell appeals the order of the Jefferson Circuit Court granting the motions for summary judgment filed by Jewish Hospital and St. Mary's Healthcare, Inc., d/b/a Frazier Rehab Institute (Frazier) and David Seligson, M.D. After a careful review of the record, we affirm because Luttrell

failed to put forth expert evidence in support of her claims and the circuit court did not abuse its discretion in denying Luttrell's motion for a continuance.

Luttrell underwent knee replacement surgery. Dr. Seligson was her surgeon. Following her surgery, Luttrell was sent to Frazier for rehabilitation treatment. Approximately one week after her discharge from Frazier, Luttrell went to see her general practitioner, Dr. John Kilgallin. Luttrell complained of swelling, tenderness and warmth around her incision. Dr. Kilgallin recommended that she go see Dr. Seligson, which she did that day. Dr. Seligson admitted Luttrell to University Hospital for observation because it was suspected that she had an infection. She was discharged and returned home several days later.

Approximately two weeks after returning home, Luttrell fell and split the surgical incision in her knee completely open and injured a tendon and a ligament in her knee. Luttrell then underwent surgery to repair her tendon and ligament, and the wound was irrigated with antibiotics.

Luttrell filed her *pro se* complaint in this case, contending that Dr. Seligson and Frazier were negligent during her initial surgery and rehabilitation treatment. Specifically, she alleged that she developed an infection in her knee after her initial surgery as a result of the defendants' negligence.

In late 2006, the defendants propounded discovery on Luttrell requesting the identities and opinions of her expert witnesses expected to testify in support of her claims. Luttrell responded by stating that she had not secured any experts at that time to testify on her behalf.

In the spring of 2007, the circuit court set various pre-trial deadlines, including the deadline of ninety days before trial for Luttrell to disclose her expert witnesses, and the subject matter and substance of the testimony those witnesses would provide.

A few days after this order was entered, the defendants each filed motions for summary judgment, arguing that Luttrell could not establish a prima facie case of medical negligence because she had not disclosed an expert witness. Luttrell responded by arguing that the motions were premature because she needed more time for discovery. She also identified Dr. Kilgallin as a possible expert witness to testify for her. Luttrell stated as follows:

> Dr. Kilgallin has expressed his willingness to serve as an expert witness in [Luttrell's] case in whatever capacity she deems necessary, through deposition or testimony at trial. Dr. Kilgallin is intimately familiar with [Luttrell's] medical condition, as well as her medical condition prior to and immediately after the procedure that is the subject of this litigation.

On August 29, 2007, the circuit court entered an order stating that "Luttrell must utilize expert testimony for her to establish a prima facie case of medical malpractice in the case at bar." The court also noted that Luttrell's expert witness disclosure concerning Dr. Kilgallin did not comply with CR[1] 26.02(4)(a)(i) because it did not provide "the substance of the facts and opinions to which the expert is expected to testify and a summary of the ground for each opinion." The circuit court further noted that "[a]s trial is less than 90 days away, Luttrell is

[1] Kentucky Rule of Civil Procedure.

beyond the time provided by this Court to disclose her expert witnesses in compliance with CR 26.02(4)(a)(i)." The court stayed the defendants' motions for summary judgment and provided Luttrell until September 6, 2007, "to supplement her expert witness disclosure, so as to comply with CR 26.02(4)(a)(i). If she fails to supplement her disclosure by that date, the motions for summary judgment will be granted. If Luttrell adequately supplements her expert witness disclosure in compliance with CR 26.02(4)(a)(i), the motions will be denied."

Luttrell then retained counsel, and her counsel filed an expert witness disclosure. This disclosure provided as follows:

> Dr. Kilgallin is expected to testify as to his opinion that [Luttrell] contracted an infection during, or immediately prior to, her inpatient treatment with Defendant, [Frazier] Rehab Institute. Further, Dr. Kilgallin is expected to testify as to his opinion that [Luttrell] would not have contracted said infection, and that said infection could have been prevented and/or eliminated within a reasonable time, but for the acts and/or omissions of the Defendant, [Frazier] Rehab Institute, [and] that said infection should have been treated with an aggressive course of antibiotics immediately upon the discovery of same, and that those actions and/or omissions were the proximate cause of said infection. Dr. Kilgallin's opinion is based upon the grounds that Defendant, [Frazier] Rehab Institute, failed to satisfy the requisite standard of care under the circumstances with regard to the provision of said care.
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> * * *
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> Dr. Kilgallin is expected to testify as to his opinion that the Defendant, Dr. David Seligson, or another physician/surgeon under his direct supervision and control, was negligent in performing the subject knee replacement surgery, and was further negligent in failing

> to properly attend to [Luttrell's] post-surgical care and the monitoring of [Luttrell's] progress in recovery and subsequent medical condition. . . . Dr. Kilgallin is further expected to testify as to his opinion that [Luttrell's] medical condition, specifically as it relates to the knee upon which the Defendant performed surgery, would be improved but for the Defendant's actions and/or omissions based upon Dr. Seligson's failure to visit [Luttrell] for at least one week after the performance of [her] knee replacement surgery. Dr. Kilgallin is further expected to testify that Dr. Seligson should have responded more aggressively to [Luttrell's] infection, and that an aggressive course of antibiotics should have been prescribed immediately upon the discovery of said infection. Dr. Kilgallin is also expected to testify as to his opinion that the same infection has persisted in [Luttrell's] knee to the present time. Dr. Kilgallin's opinion is based upon the grounds that Dr. Seligson provided [Luttrell] medical care in such a manner that the requisite standard of care required under the circumstances was not satisfied, and that it is Dr. Kilgallin's expert opinion that [Luttrell's] medical condition has suffered since the time of said procedure as a direct and proximate result of the actions and/or omissions of the Defendant, Dr. Seligson.

However, during his subsequent deposition, Dr. Kilgallin testified that he had no knowledge to suggest that Frazier Rehab was culpable for causing Luttrell's infection or was culpable in any other way in the case. Dr. Kilgallin also testified that he had no documentation as to what Dr. Seligson did or did not do, so he could not testify as to the appropriateness of Dr. Seligson's treatment of Luttrell.

Luttrell moved for a continuance of the hearing on the defendants' motions for summary judgment, as well as of the trial date. The circuit court

denied her motion for a continuance, and upon reviewing the defendants' motions for summary judgment, the circuit court discussed Dr. Kilgallin's deposition as follows:

> In the course of that deposition, Dr. Kilgallin stated that he would not take the position that either Dr. Seligson or Frazier Rehab was at fault in causing Luttrell's infection, since he could not offer any opinion as to when the infection first set in. Dr. Kilgallin could not state that the infection was the proximate cause of any injury to Luttrell. Dr. Kilgallin testified that he had never seen any medical records other than his own for Luttrell's care and could not offer any criticism of Dr. Seligson for his management of the infection. In short, Dr. Kilgallin offered no testimony that Dr. Seligson or Frazier Rehab deviated from the applicable standard of care, or that any such failure caused Luttrell's alleged infection.

The court continued:

> There is nothing of an evidentiary nature in the record which indicates that Dr. Seligson or Frazier Rehab deviated from the applicable standard of care in this case. As such, it appears that it will be impossible for [Luttrell] to prevail on her claims, entitling Defendants to summary judgment as a matter of law.

Thus, the circuit court granted the defendants' motions for summary judgment. Luttrell now appeals, contending that the circuit court erred in granting the defendants' motions for summary judgment.

"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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be

viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr. Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id*. Further, "the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." *Id*. at 482.

Luttrell alleges that Dr. Seligson and Frazier Rehab are liable based on her claims of medical negligence. This Court has stated the law regarding medical negligence claims as follows:

> The presumption of negligence is never indulged in from the mere evidence of mental pain and suffering of the patient, or from failure to cure, or poor or bad results, ... The burden of proof is upon the patient to prove the negligence of the physician or surgeon, and that such negligence was the proximate cause of his injury and damages. . . .
>
> Except in limited factual circumstances, however, the plaintiff in a medical negligence case is required to present expert testimony that establishes (1) the standard of skill expected of a reasonably competent medical practitioner and (2) that the alleged negligence proximately caused the injury.
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> The opinion of the expert must be based on reasonable medical probability and not speculation or possibility. To survive a motion for summary judgment in a medical malpractice case in which a medical expert is required, the plaintiff must produce expert evidence or summary judgment is proper.

> Kentucky consistently recognizes two exceptions to the expert witness rule in medical malpractice cases. Both exceptions involve the application of the *res ipsa loquitur* doctrine and permit the inference of negligence even in the absence of expert testimony. 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. 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.

Andrew v. Begley, 203 S.W.3d 165, 170-71 (Ky. App. 2006) (internal quotation marks and citations omitted).

"A trial court's ruling with regard to the necessity of an expert witness [is] within the court's sound discretion." *Nalley v. Banis*, 240 S.W.3d 658, 661 (Ky. App. 2007) (internal quotation marks omitted). In the present case, the circuit court found that an expert witness was necessary because the issue of whether Luttrell's infection was the result of medical negligence was not a situation qualifying for one of the exceptions to the expert witness rule. As previously mentioned, Dr. Kilgallin testified during his deposition that he had no knowledge to suggest that Frazier Rehab was culpable for causing Luttrell's infection or was culpable in any other way in the case. Dr. Kilgallin also testified that he had no documentation as to what Dr. Seligson did or did not do, so he could not testify as to the appropriateness of Dr. Seligson's treatment of Luttrell.

Therefore, because even Luttrell's family doctor could not determine whether the defendants acted negligently, it stands to reason that a layperson also could not make such a determination and, thus, that Luttrell's case does not qualify for either exception to the expert witness rule. Consequently, the circuit court did not abuse its discretion in determining that an expert was necessary in this case.

Furthermore, because an expert witness was necessary, but Luttrell's only expert, Dr. Kilgallin, did not testify in his deposition that either of the defendants acted negligently, the circuit court properly granted summary judgment.

To the extent that Luttrell claims the circuit court erred in denying her a continuance for the purpose of allowing "Dr. Kilgallin to review [Luttrell's] medical records and provide a statement based upon said review," we disagree. "The application for a continuance is addressed to the sound discretion of the court, and unless this discretion has been abused the action of the court will not be disturbed." *Simpson v. Sexton*, 311 S.W.2d 803, 805 (Ky. 1958). "An abuse of discretion occurs when a trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 378 (Ky. 2000) (internal quotation marks omitted). There are seven factors to consider in determining whether to grant a continuance: "length of delay, number of prior continuances granted, inconvenience to litigants, which party caused the delay, availability of counsel, complexity of the case, and prejudice to the parties." *Pendleton v. Commonwealth*, 83 S.W.3d 522, 526 (Ky. 2002).

In the present case, the circuit court had previously granted an extension of time for Luttrell to file her expert witness disclosures, and the court had also previously stayed ruling on the defendants' motions for summary judgment. Luttrell then moved for a continuance on the basis that it was necessary so that "Dr. Kilgallin could review Luttrell's [medical] records and issue a statement of his opinions based on that review." In denying Luttrell's motion for a continuance, the circuit court reasoned as follows:

> Luttrell's expert disclosure asserts that Dr. Kilgallin's opinions would be based in part o[n] a review of those records, and gives a detailed recitation of those expected opinions. This leads the Court to believe that the disclosure was filed prior to any meaningful discussion between Luttrell and her chosen expert, and that those meaningful discussions still have not occurred. The Court finds that Luttrell has had more than adequate time to prepare her case, and that Dr. Kilgallin's testimony does not support her claims.

Thus, prior extensions of time pertaining to the expert witness had been granted in this case; approximately seven months had passed between the time the court had initially granted the extension of time to file the expert disclosures and the time that Luttrell moved for a continuance; Luttrell was the party who caused the delay; and Luttrell had provided no expert testimony to support her causes of action. Consequently, the circuit court did not abuse its discretion in denying Luttrell's motion for a continuance.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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