

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001957-MR

BERTHA GOODPASTER,
Personal Representative for the
Estate of ROBERT E. GOODPASTER

APPELLANT

v. APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 05-CI-90092

RIDGEWAY NURSING AND
REHABILITATION FACILITY, LLC,
D/B/A HILLTOP LODGE, INC.; AND
JOHN DOES 1-10

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: MOORE AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

VANMETER, JUDGE: Bertha Goodpaster (Goodpaster), personal representative
for the estate of Robert Goodpaster, appeals from a final order and judgment of the

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Bath Circuit Court granting a motion for a directed verdict on behalf of Ridgeway Nursing and Rehabilitation Facility, LLC d/b/a Hilltop Lodge, Inc., and John Does 1-10 (appellees). For the following reasons, we affirm.

In this case, Goodpaster alleged that appellees' nursing home negligence resulted in the death of Robert Goodpaster. During the afternoon of the first day of trial, Goodpaster informed the court that her only medical expert, a Florida resident, would not arrive that evening since his flight had been cancelled due to tropical storm weather conditions. The following morning, Goodpaster informed the court that her expert's flight had been rescheduled for early that morning, but that he had missed the flight. The court denied Goodpaster's motion for a continuance at that time, citing Goodpaster's failure to offer any explanation as to why her expert missed the flight and why he could not arrive by way of alternative transportation, such as an automobile. The court then advised Goodpaster that it would permit her expert to testify the next morning, on the third day of trial.

After conferring with her expert, Goodpaster notified the court that her expert would not be able to appear at all. The only explanation Goodpaster offered for his unavailability was that his appearance was "impossible." Goodpaster made a motion to introduce her expert's discovery deposition into evidence, to which appellees objected. Appellees' objections were sustained.

Goodpaster declined to call any additional witnesses and closed her case. Thereafter, the court granted appellees' motion for a directed verdict

pursuant to CR² 50.01 since, as a matter of law, Goodpaster had not established the requisite elements of negligence. Goodpaster appealed.

Goodpaster claims that the trial court: (1) abused its discretion by denying her motion for a continuance, (2) abused its discretion by denying her motion to introduce her expert's opinion via deposition, and (3) erred by granting appellees' motion for a directed verdict. We disagree.

First, Goodpaster asserts that the court abused its discretion by denying her motion for a continuance. "An application for a continuance is addressed to the sound discretion of the trial court and unless the discretion has been abused the action of that court will not be disturbed." *Wells v. Salyer*, 452 S.W.2d 392, 395-96 (Ky.App. 1970). "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) (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

As stated above, Goodpaster's expert could not appear as scheduled on the first day of trial because his flight had been cancelled. However, the expert's flight was rescheduled for early the following morning. Evidently flights were available at that time, but the expert did not feel that it was prudent or safe to travel, via plane or automobile.

² Kentucky Rules of Civil Procedure.

Goodpaster contends that her expert's failure to appear was not the result of dilatory conduct on her behalf. Further, she cites instances during pre-trial proceedings in which appellees were given continuances for various reasons, including for the procurement of expert witnesses. However, despite Goodpaster's contention that she was not acting in bad faith, the court found the explanation for her expert's absence insufficient. The court's determination that a continuance should not be granted in this instance was not an abuse of its discretion.

Second, Goodpaster claims that the court abused its discretion by denying her motion to introduce her expert's opinion pursuant to CR 32.01, which addresses the use of depositions in court proceedings, in pertinent part, as follows:

At the trial . . . any part or all of a deposition, so far as admissible under the rules of evidence applies as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

. . . .

(c) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness: (i) is at a greater distance than 100 miles from the place where the court sits in which the action is pending or out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or . . . (vi) is a practicing physician[.]

Although appellees had the opportunity to question Goodpaster's expert during his deposition, they objected to the introduction of his deposition

during trial on the grounds that the deposition contained statements and conclusions which were inadmissible under the Kentucky Rules of Evidence and that admitting the deposition would deprive them of an opportunity to cross-examine the expert.

While reasonable minds may differ regarding the use of discovery depositions at trial, “depositions taken for discovery have a different purpose than those for trial.” Kentucky Practice Rules of Civil Procedure Annotated Rule 32.01 (6th ed. 2009). The strategy and goals of a discovery deposition are different than a deposition taken to preserve testimony for or taken for use at trial. *See Polozie v. U.S.*, 835 F.Supp. 68 (D. Conn. 1993). “A deposition or any part of it may only be used if: (1) its use is authorized by this Rule and (2) the evidence offered is admissible under the rules of evidence ‘applied as though the witness were then present and testifying.’” 6 Ky. Prac. R. Civ. Proc. Ann. Rule 32.01. “Further, the decision whether to admit evidence is vested in the sound discretion of the trial court and will not be reversed absent a showing of an abuse of discretion.” *Welsh v. Galen of Virginia, Inc.*, 128 S.W.3d 41, 51 (Ky.App. 2001).

Here, the court made efforts to accommodate the fact that the expert’s Monday morning flight had been cancelled by allowing Goodpaster additional opportunities for her expert to testify at trial. Despite this, Goodpaster’s expert did not appear to testify, explaining simply that his appearance was “impossible.” Goodpaster has failed to show that the court’s decision not to allow introduction of his discovery deposition into evidence was “arbitrary, unreasonable, unfair, or

unsupported by sound legal principles” and thus, an abuse of its discretion.

Farmland Mut. Ins. Co., 36 S.W.3d at 378.

Finally, Goodpaster argues that the court erred by granting appellees’ motion for a directed verdict. “Under Kentucky law, a directed verdict is appropriate when, drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict.” *Buchholtz v. Dugan*, 977 S.W.2d 24, 26 (Ky.App. 1998). “Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.” *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

As the court correctly noted, a plaintiff in a nursing home negligence case, much like a plaintiff in a medical malpractice action, must offer expert testimony to establish the standard of professional care against which the conduct of the nursing home must be measured. *See Hall v. Caritas Health Services, Inc.*, 2003 WL 1786644 (Ky.App. 2003) (Appellants’ negligence claim must fail because they have no competent expert opinion establishing a causal connection between any nursing negligence and decedent’s death). “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.’” *Nalley v. Banis*, 240 S.W.3d 658, 661 (Ky.App. 2007) (quoting *Perkins v. Hausladen*, 828 S.W.2d 652, 654-55 (Ky. 1992)).

As Goodpaster's only medical expert failed to appear at trial and Goodpaster failed to provide any other expert testimony to support a *prima facie* case of negligence in an action in which expert testimony was apparently necessary, Goodpaster's claim must fail as a matter of law. Consequently, the court did not err by granting appellees' motion for a directed verdict on this basis.

The judgment of the Bath Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Cheryl A. Harrison
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