

RENDERED: AUGUST 17, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002150-MR

LISA WALKER AND HER
HUSBAND LARRY WALKER

APPELLANTS

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 07-CI-00277

C. LANCE LOVE, M.D., PLLC
AND C. LANCE LOVE, M.D.,
PERSONALLY AND INDIVIDUALLY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: MOORE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

STUMBO, JUDGE: Lisa Walker and her husband, Larry Walker, appeal from orders of the Christian Circuit Court which granted summary judgment to C. Lance

¹ Senior Judge Joseph E. Lambert 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.

Love, M.D., personally and individually; and C. Lance Love, M.D., PLLC, in this medical malpractice action. The issue on appeal is whether the Walkers' failure to name a medical expert witness constituted a failure of proof that justified the grant of summary judgment.

On February 28, 2007, Lisa and Larry Walker filed a complaint alleging medical negligence in connection with a thyroidectomy, which Dr. Love performed on Lisa. Shortly after the surgery, Lisa experienced respiratory distress, and Dr. Marshall Van Meter, who was on duty at the time, directed her to be placed on a ventilator. She remained on the ventilator for four days following the surgery and remained hospitalized for a total of twelve days. After the surgery, she experienced difficulty breathing and speaking. She consulted Dr. Uday V. Dave, an otolaryngologist (an ear, nose and throat specialist) who diagnosed right vocal cord paralysis.

In their interrogatories, the defendants asked whether any physicians had indicated that Dr. Love had deviated from the standard of good medical practice. The plaintiffs' response, which was filed on August 16, 2007, stated that their attorney had "consulted with a surgeon to verify that there was a departure from the standard of care to cut, stretch, tear, compress or damage the vocal cord of Lisa Walker that has caused her irreparable damage and great difficulty breathing. The Plaintiff herself had discussions with her treating physicians and believes that they know there was a deviation from the standard of good medical practice and the Plaintiff's care[.]" The response listed as the treating physicians Dr. Prakash

Shah, the internist who referred her to Dr. Love; Dr. Dave, who diagnosed the vocal cord paralysis; Dr. Ossoff, another otolaryngologist who told Walker that her right vocal cord was damaged during surgery; and Dr. Van Meter.

Depositions were taken on the following dates: the Walkers (June 17, 2008); Dr. Love (April 23, 2009); Dr. Dave (July 16, 2009); Dr. Shah (July 21, 2009); and Dr. Van Meter (August 12, 2009).

On November 19, 2009, Love filed a motion to set the case for trial and for an appropriate scheduling order to be issued that would require the Walkers to disclose expert witnesses in a timely manner. Love also tendered a proposed order which required the Walkers to disclose expert witnesses by a certain date. On January 13, 2010, almost three years after the filing of the complaint, the trial court entered a pretrial order setting the case for trial on November 29, 30 and December 1, 2010. A pretrial conference was scheduled for September 29, 2010. The order contained no specific deadline for the disclosure of expert witnesses; it stated in pertinent part as follows:

Discovery compliance and witness disclosure shall occur as quickly and efficiently as possible with utmost good faith expected of counsel. Discovery/disclosure shall be pursued in a manner that does not delay resolution of the case or result in delay of the trial. All disclosures anticipated under the civil rules shall be made sufficiently in advance of the pretrial conference to allow meaningful utilization by the opposing party. All discovery shall be completed at least ten days prior to the pretrial conference. Failure to file complete, accurate and timely information or failure to participate in discovery/disclosure as set out above may result in

sanctions. See CR [Kentucky Rules of Civil Procedure] 37.02.

NO DATE OR DEADLINE CAN BE MODIFIED BY AGREEMENT OF THE PARTIES. ANY REQUEST FOR MODIFICATION REQUIRES THE COURT'S APPROVAL.

On July 12, 2010, Love moved for summary judgment because the plaintiff had failed to identify an expert who would testify that Dr. Love had failed to conform to the applicable medical standard of care.

The Walkers responded by filing a motion to reschedule the trial and for an extension of time to list their experts or to file a written report by an expert. The Walkers' attorney also attached an affidavit, claiming that the delays were due to the pressure of his work on other cases, and to the fact that defense counsel had undergone several back surgeries. The Walkers also argued that summary judgment was inappropriate because evidence elicited in the depositions raised genuine issues of material fact and created a legitimate dispute about the need for a medical expert.

According to the deposition testimony of Dr. Prakash Shah, and Lisa's medical records, Lisa was being treated for hypothyroidism, or low thyroid, prior to the surgery. This treatment included taking Synthroid medication. She consulted Dr. Shah, an internal medicine physician, because she was experiencing shortness of breath and chest palpitation. An ultrasound of her thyroid gland showed "slight enlarged right lobe of thyroid with small hypoechoic lesion." Dr. Shah referred her to Dr. Love to consider whether surgical removal of her thyroid

gland was an appropriate method of treating her symptoms. Lisa had one consultation with Dr. Love before he performed surgery to remove her thyroid gland. According to Lisa, he performed no independent pre-operative tests. Lisa signed a consent form on the day of the surgery which stated that her condition had been explained to her as “Thyroid nodule. Thyroid storm.” Thyroid storm is a result of hyperthyroidism, or overactive thyroid. Dr. Love also prescribed iodine medication for the supposed high thyroid condition. According to Dr. Shah, thyroid storm is a life-threatening emergency condition requiring prompt treatment. Dr. Shah and Dr. Dave both testified that the proper treatment for thyroid storm is not surgery, but immediate hospitalization and consultation with an endocrinologist. Dr. Shah testified that according to his workup or diagnosis of Lisa Walker, she had hypothyroid, or low thyroid, and that she did not have thyroid storm, diffused goiter or thyrotoxic crisis.

In his deposition, Dr. Love testified that “[t]he clinical picture that [Lisa] presented was one of a multi-nodule thyroid gland and thyroid storm, an intermittent balance of excess thyroid activity leading to irregular heartbeat.” He further testified that he did not tell Lisa Walker that she needed the surgery, but rather that she herself had requested it. He also testified that injury to the laryngeal nerve is a known complication of a thyroidectomy and that paralysis of the right vocal cord can occur following a thyroidectomy even if the surgeon did not commit medical malpractice. Dr. Dave testified that paralysis of the right vocal

cord can occur following a thyroidectomy even if the surgeon did not commit any medical malpractice.

The operative report stated that Lisa's right laryngeal nerve was "densely adherent" to the right lobe of her thyroid gland. The nerve was dissected from the thyroid gland during the course of the surgery and may have been damaged during that process. Dr. Love testified that he did not know if he had cut, injured or damaged her right laryngeal nerve during the course of the surgery.

According to Lisa Walker, Dr. Love never informed her that the surgery was optional and never warned her about any side effects, beyond stating that she could live or die as a result of the surgery.

The Walkers argued that the deposition testimony created a legitimate dispute about the need for a surgical expert witness. They characterized as the crucial issue the fact that "Dr. Love did not do any workup before the surgery and that the surgery was not justified." They also contended that Dr. Love had misdiagnosed thyroid storm or used it as a fraudulent misrepresentation to justify surgery.

Following a hearing on July 28, 2010, the trial court entered an order granting C. Lance Love, M.D.,'s motion for summary judgment "due to failure of proof, not failure to meet a deadline. Motion not premature."

The Walkers filed a motion to set aside and vacate the order or to amend the attachments to include a written opinion from Stephen A. Mitchell, M.D., of Nashville Ear, Nose and Throat at St. Thomas Hospital in Nashville, Tennessee.

The motion reiterated that a jury could understand a large portion of the evidence and that a surgical expert was not necessary.

On October 19, 2010, the Walkers filed a letter from physician William R. Panje, an otolaryngologist with added expertise in head and neck surgery, which stated as follows:

C. Lance Love, M.D. did not follow the standard of care in establishing a correct diagnosis of Lisa Walker's thyroid disorder prior to performing a thyroidectomy. Lack of performing the usual tests of thyroid antibodies, radioactive iodine uptake, and needle biopsy as well as knowing Mrs. Walker was taking Synthroid which can give rise to all of her symptomatology indicates Dr. Love's inappropriate recommendation of a total thyroidectomy before considering appropriate medical therapy.

C. Lance Love, M.D. did not follow the standard of care in performing a total thyroidectomy before normalizing Lisa Walker's hyperthyroidism. His action in not having her hyperthyroidism corrected prior to her thyroid operation predisposed Mrs. Walker to a life threatening medical condition called Thyroid Storm.

C. Lance Love, M.D. did not follow the standard of care in performing a total thyroidectomy on Lisa Walker since surgery was not indicated. In performing a total thyroidectomy, Dr. Love injured Lisa Walker's nerve to her voice box (larynx) so that she has a permanent weak and hoarse voice, cannot breathe freely, and has lost lifting strength.

On October 20, 2010, the trial court denied the motion to alter, amend or vacate and also ruled from the bench that C. Lance Love, M.D., PLLC was included in the summary judgment. On October 22, 2010, the Walkers refiled a notarized copy of Dr. Panje's opinion. This appeal followed.

The applicable 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). Summary judgment “shall be rendered forthwith 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 judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record “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).

Summary judgment is proper only “where the movant shows that the adverse party cannot prevail under any circumstances.” *Id.* However, “a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.” *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). Since “summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court’s decision and will review the issue *de novo*.” *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

In *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010), the Kentucky Supreme Court outlined the circumstances under which summary judgment may be granted in a medical malpractice action for failure to disclose a medical expert. Due to the specialized nature of the evidence in a medical malpractice action, expert testimony is usually necessary “to show that the defendant medical provider failed to conform to the standard of care.” *Id.* at 670. An exception to this general rule exists 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.* (quotation marks and citations omitted). Thus,

[m]edical malpractice cases can . . . be divided into two categories: cases where the parties do not dispute the need for expert testimony, which encompass the vast majority of medical malpractice claims, and cases where the plaintiff disputes the need for expert testimony because he contends one of the narrow exceptions applies.

Id.

In the first and largest category of cases, where the parties do not dispute the need for expert testimony, the failure to name an expert witness in a timely manner can constitute a failure of proof warranting summary judgment. In the second category, when the need for an expert is legitimately disputed, the trial court must make a separate ruling on that issue before entertaining a motion for summary judgment. Thus, “[i]n cases where there is a real dispute regarding the need for

expert testimony, imposing sanctions on the plaintiff for failing to comply with a scheduling order requiring disclosure of the expert's name and testimony is a more appropriate remedy than a summary judgment.” *Id.* at 671.

In this case, there was no specific expert disclosure deadline, although the trial court had set a firm trial date and ordered that all disclosures had to be made “sufficiently in advance” of the pretrial conference, scheduled for September 29, 2010. The summary judgment was granted two months before that date, on July 28, 2010. In their response to the motion for summary judgment, the plaintiffs disputed the need for an expert, arguing that “a jury can understand without a surgical expert that if Lisa Walker did not have thyroid storm that has been confirmed by Dr. Shah, that the proper treatment was to put her in a hospital in the ICU and not to perform surgery and a jury can understand that Lisa Walker was assured that everything would be fine that was not.”

There is a significant discrepancy between the diagnosis of Lisa as suffering from low thyroid prior to the surgery and Dr. Love's diagnosis of thyroid storm. Furthermore, even if Dr. Love was correct that she was suffering from thyroid storm, his decision to operate was questionable in light of Dr. Shah's and Dr. Dave's testimonies that the proper treatment for thyroid storm is immediate hospitalization and consultation with an endocrinologist. “[E]xpert testimony is not necessary ‘where the common knowledge or experience of laymen is extensive enough to recognize or infer negligence from the facts.’” *Baylis v. Lourdes Hosp. Inc.*, 805 S.W.2d 122, 124 n. 3 (Ky. 1991)(citation omitted). In this case, the

medical evidence created at least the possibility that a jury could have believed that Dr. Love performed the thyroidectomy without first having made a proper diagnosis. “[S]ummary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor.” *Lewis*, 56 S.W.3d at 436. At the very least, the evidence was sufficient to create a legitimate dispute about the need for an expert witness. In light of these circumstances, the trial court “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.” *Poe v. Rice*, 706 S.W.2d 5, 6 (Ky. App. 1986).

The grant of summary judgment in favor of C. Lance Love, M.D., personally and individually, and C. Lance Love, M.D., PLLC, is therefore reversed, and the matter is remanded for further proceedings.

LAMBERT, SENIOR JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MOORE, JUDGE: Respectfully, I dissent from the majority opinion and would affirm the trial court’s judgment. Discovery in this medical malpractice case lingered over three-and-a-half years without the Walkers disputing whether a medical expert was needed, without their naming a medical expert, and without their submitting a properly verified expert opinion. Furthermore, when Dr. Love moved for summary judgment, his motion was supported with his deposition testimony and that of other treating physicians who were not critical of Dr. Love’s

standard of care. The Walkers failed to come forward with any affirmative evidence to defeat summary judgment. Instead, they argued the motion was premature and sought a continuance of the trial date.

The Walkers only argued that there was a dispute regarding the need for a “surgical expert” after the filing of the summary judgment motion by the defendants. Like the plaintiff in *Blankenship v. Collier*, 302 S.W.3d 665, 675 (Ky. 2010), the Walkers “never objected to the court-ordered expert disclosure deadline and never suggested, until [their] response to the motion for summary judgment, that [theirs] was the type of medical malpractice case that did not require expert testimony.”

The trial court granted summary judgment to Dr. Love on September 14, 2010, noting that the basis of the judgment was “due to failure of proof, not on failure to meet a deadline. Motion not premature [sic].” A trial court is granted wide latitude in managing its docket and discovery deadlines. Here the trial court-- after three years for discovery-- specifically found that Dr. Love’s motion was not premature. Hence, inherent in the decision of the trial court is a finding that there had been a sufficient opportunity for discovery. Also inherent in the court’s ruling is the conclusion that this was a case in which expert testimony was necessary due to the court’s finding of a “failure of proof.”

I agree with the trial court that a jury would require the assistance of a medical expert witness to resolve whether a thyroidectomy was the appropriate action and whether Dr. Love performed the surgery in a negligent manner leading

to Mrs. Walker's injuries. Failing to come forward with some expert proof to defeat summary judgment was fatal to the Walkers' case; hence, I concur with the trial court that summary judgment was warranted based on a failure of proof on the Walkers' part.

Although the Walkers timely moved to alter, amend or vacate the judgment, they failed to submit any affirmative evidence for the relief they sought.

Thereafter, they submitted Dr. Panje's unsworn letter on October 19, 2010, apparently pursuant to CR 60.02, in an attempt to be relieved from the judgment.

Both attempts at relief from the judgment were denied by the trial court.

The decision to deny a motion under CR 60.02 or a motion to alter, amend or vacate a judgment pursuant to CR 59.05 rests within the trial judge's sound discretion. *See Schott v. Citizens Fidelity Bank & Trust Co.*, 692 S.W.2d 810, 814 (Ky. App. 1985). The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Under the circumstances of this case, the trial court did not abuse its discretion. The trial court found that the plaintiffs were provided ample opportunity to name an expert medical witness; their lawsuit was filed in February 2007; Dr. Love began submitting discovery requests seeking, in part, disclosure of expert witnesses within a month thereafter; and summary judgment was granted over three-and-a-half years later. The dispute regarding whether an expert witness was necessary was raised by the Walkers for the first time after the summary judgment motion

was filed. Nonetheless, the evidence showed--and inherent to the decision of the trial court--an expert was undoubtedly necessary under the facts of the case.

Finally, even after summary judgment was granted, the plaintiffs failed to submit a properly verified opinion from Dr. Panje or to otherwise properly support their post-judgments motions. Accordingly, I would affirm the trial court's judgment.

BRIEFS FOR APPELLANTS:

Wendell Holloway
Madisonville, Kentucky

BRIEF FOR APPELLEES:

E. Frederick Straub, Jr.
Jonathan R. Oliver
Paducah, Kentucky