

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000876-MR

WILLIAM LOVELL BRANCH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JR., JUDGE  
ACTION NO. 09-CI-06508

REX A. GIBSON

APPELLEE

OPINION  
AFFIRMING

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BEFORE: J. LAMBERT, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: William Lovell Branch appeals from a Judgment and Final Order of the Fayette Circuit Court dismissing his negligence action against John Lankford and Rex Gibson. Branch alleged that Lankford and Gibson negligently operated their respective vehicles which caused an accident resulting in Branch's traumatic brain injuries. He argues that the trial court erred in concluding that no

genuine issues of material fact remained for adjudication, and that the Defendants/Appellees were entitled to Summary Judgment as a matter of law. Branch contends that his growing recollection of the accident raises genuine issues of material fact relating to causation, that expert testimony is not required to overcome a Summary Judgment motion, and that the trial court erred when it restricted his witnesses due to alleged Kentucky Rules of Civil Procedure (CR) 26 disclosure deficiencies. We find no error, and AFFIRM the Judgment and Final Order on appeal.

On December 7, 2007, Branch was driving his vehicle northbound on I-75 in Fayette County, Kentucky. The weather was inclement and the roadway was icy. Branch would later state that he recalled seeing headlights behind his vehicle. Branch's vehicle was then involved in an accident with one or two other vehicles operated by Lankford and Gibson, whereupon Branch's vehicle slid off the roadway and came to rest in a field. Branch was transported to the University of Kentucky Hospital, where he allegedly was diagnosed with a traumatic brain injury.

On December 7, 2009, Branch filed the instant action against Lankford and Gibson in Fayette Circuit Court claiming that the defendants negligently operated their motor vehicles which resulted in the accident causing Branch's injuries. Lankford and Gibson responded with general denials, and maintained that Branch lost control of his vehicle when crossing the bridge over I-64, then struck Lankford's vehicle before continuing over an embankment and into

a field. According to both Lankford and Gibson, their respective vehicles then collided.

An extensive procedural history then followed, which is detailed in the record. Interrogatories were first served on Branch on April 1, 2010. The following month, Branch's trial counsel withdrew, and Branch obtained new counsel. During this time, Lankford and Gibson moved to compel Branch to answer discovery. Branch responded that he could not remember the details of the accident and needed a qualified expert to reconstruct the accident. Branch was deposed on August 29, 2011, and in May, 2011, Gibson moved to compel Branch to provide full CR 26 expert disclosure by October 3, 2011. After Branch's counsel provided only the name of the accident reconstruction expert but no other information, Gibson moved to strike the expert based on the missed deadline. The court then set a new deadline for November 11, 2011.

The day before the new deadline for CR 26 expert witness disclosures, Branch's second trial counsel withdrew. The court then moved the deadline to December 12, 2011. Branch did not retain new counsel until one month after the extended deadline, and no CR 26 expert witness disclosures were made. The court then moved the CR 26 deadline to March 16, 2012, and the parties orally agreed to extend it to March 23, 2012.

Branch's new trial counsel delivered an expert witness list to the Defendants on March 23, 2012. The Defendants responded that the disclosure was insufficient, and tendered a joint Motion to Dismiss on March 26, 2012. Four days

later, the Fayette Circuit Court conducted a hearing on the motion. On April 10, 2012, the court struck all expert testimony from Branch's accident reconstruction and vocation experts for failure to provide a full and complete CR 26 expert witness disclosure despite having ample opportunities to comply. The court also limited Branch's medical witness to testimony regarding treatment but no opinion testimony as to causation.

At the time of the April 10, 2012 Order, Branch was represented by two trial attorneys. Within two weeks of the entry of the Order, each counsel moved to withdraw, and Lankford and Gibson filed a renewed joint Motion to Dismiss the action. A hearing on the motions was conducted on April 27, 2012, where the motions were sustained. At the hearing, the court questioned Branch as to his memory of the accident, and Branch responded that his memory was improving over time and that he was recollecting more details of the accident. The court then noted that it should not have asked Branch those questions because Branch was not sworn in as a witness. The court then granted the motions of plaintiff's counsel to withdraw. It also determined that based on the sworn testimony of record, it would grant Summary Judgment in favor of Lankford and Gibson. This ruling was based on the trial court's determination that Branch had missed multiple directives to comply with CR 26 witness disclosure, and that Branch's only sworn testimony was that he could not recall any details of the

accident relating to causation. Branch retained new counsel, and this appeal followed.<sup>1</sup>

Branch first argues that the trial court erred in sustaining the Appellees' CR 56 Motion for Summary Judgment. Branch maintains that the trial court abused its discretion when it failed to acknowledge Branch's testimony pertaining to a material issue of fact regarding his memory of the accident. Specifically, Branch directs our attention to a hearing conducted on April 27, 2012, during which the trial court asked, "Mr. Branch do you remember the accident, sir?", to which Branch responded that it "started coming back to me Sir, been about a month now." Defense counsel then remarked that Branch was contradicting his earlier testimony when Branch had stated that he was suffering from a brain injury and could not remember the accident. The trial court subsequently determined that it should not have elicited Branch's statement because Branch was not under oath. The following month, the Fayette Circuit Court sustained the Motion for Summary Judgment upon concluding that two and one half years of discovery had failed to produce any genuine issue of material fact relating to the cause of the accident; that Branch had violated numerous Pre-Trial Orders to identify expert witnesses; and, that Branch had otherwise failed to comply with multiple orders of the court.

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<sup>1</sup> Lankford died on March 30, 2013, and it appears from the record that his Estate was not probated and no representative was appointed. Due to his death, and because no administrator or representative was appointed during the following twelve-month period, the Fayette Circuit Court rendered Summary Judgment on June 23, 2014, in favor of Lankford, and denied Branch's motions to substitute parties, and revive and amend the Complaint. On November 14, 2014, a panel of this Court entered an Order dismissing Lankford as a party to the instant appeal.

The focus of Branch's argument on this issue is that his brief, unsworn statement at the April 27, 2012 hearing was sufficient to create a genuine issue of material fact sufficient to overcome the Appellees' Motion for Summary Judgment. We do not find this argument persuasive. We first note that Branch does not reveal if this issue has been preserved for appellate review. CR 76.12(4)(c)(v). We may decline to address unpreserved issues. *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985). “The function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review.” *Id.*

Nevertheless, we will address this issue as if it were preserved. 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 a judgment as a matter of law.” CR 56.03. “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 Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary 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.” *Id.* “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.* Finally, “[t]he 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).

When viewing the record in a light most favorable to Branch and resolving all doubts in his favor, we cannot conclude that the Fayette Circuit Court improperly rendered Summary Judgment in favor of Lankford and Gibson. The accident at issue occurred on December 7, 2007. During the years that followed, and as noted by the trial court, Branch was availed of ample opportunity to produce discovery and engage expert witnesses to reconstruct the accident and/or render opinions as to causation and damages. Even so, the sole sworn testimony - whether lay or expert - supportive of Branch's claim is his statement that he remembers seeing vehicle headlights behind him just prior to the accident and remembers a collision. Nothing in the record bolsters his claim that Lankford or Gibson were negligent in operating their vehicles, and they have consistently maintained that Branch lost control of his vehicle when crossing the bridge over I-64, struck Lankford's vehicle, then continued over an embankment and came to rest in a field. As it appears impossible that Branch would be able to produce evidence at trial warranting a judgment in his favor, *Steelevest, supra*, we find no error in the entry of Summary Judgment.

Branch also argues that the trial court erred when it invoked CR 41.02 in support of dismissal. This issue as well has not been preserved for appellate

review. CR 76.12(4)(c)(v). CR 41.02 provides in relevant part that a defendant may move for a dismissal for failure of the plaintiff to prosecute or otherwise comply with the civil rules or any orders of the court. In its May 8, 2012 Judgment and Final Order, the Fayette Circuit Court noted that in "violation of Rule 41.02 the Plaintiff has failed to comply with multiple orders of the Court[.]" Given our disposition of Branch's Summary Judgment argument, we hold this issue as moot. *Arguendo*, and even if the matter were preserved for appellate review, the record amply supports the trial court's determination that Branch failed to comply with multiple orders to produce expert witnesses, if any, and to move the action toward fruition.

Lastly, Branch argues that the trial court erred and abused its discretion when it restricted his witnesses due to alleged CR 26 disclosure deficiencies. In its April 10, 2012 Order, the court restricted Branch's experts based on what it determined was Branch's "failure . . . to provide full and complete Rule 26 disclosure as required by Kentucky law and the pretrial orders of the Court." Branch contends that this sanction was not supported by the record and the law, and that lesser sanctions were appropriate.

As with the prior issues raised by Branch, this issue also was not preserved for appellate review. We will note however that a trial court's decision regarding the admissibility of evidence is reviewed for abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). The Fayette Circuit Court determined that it had given Branch multiple opportunities to



comply with CR 26 expert witness disclosure, via Branch's numerous trial attorneys, all to no avail. It cannot be said that the trial court's exclusion of Branch's treating physician testimony (as to causation), vocational rehabilitation expert and accident reconstruction expert was arbitrary, unreasonable, unfair or unsupported by sound legal principals. *Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 393 (Ky. App. 2005). As such, even if this matter were preserved for appellate review, we would find no abuse of discretion in the Fayette Circuit Court's response to Branch's failure to provide full and complete CR 26 expert witness disclosure.

For the foregoing reasons, we AFFIRM the Judgment and Final Order of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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