RENDERED: MARCH 1, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001339-MR

CARL ANDREW SMITH AND
FRANCES SMITH — APPELLANTS

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE DAVID L. WILLIAMS, JUDGE
ACTION NO. 14-CI-00088

CLINTON COUNTY HOSPITAL, INC.,
A KENTUCKY CORPORATION;
TOMMY BERTRAM; RODNEY LITTLE;
KEITH MCWHORTER; BOB TALBOTT;
AND WILLIAM POWELL — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, NICKELL AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Carl Andrew Smith and Frances Smith appeal from a summary judgment of the Clinton Circuit Court in this medical malpractice action. We conclude the trial court properly granted summary judgment to Clinton County

Hospital, Inc. (CCH) and its Board of Directors, Tommy Bertram, Rodney Little, Keith McWhorter, Bob Talbott, and William Powell (the Directors) on the grounds that the Smiths failed to provide expert testimony.

On August 18, 2014, the Smiths filed a complaint against CCH and the Directors. The Smiths alleged Carl suffered a cardiac seizure and was transported to CCH where agents and employees of CCH conducted a medical examination. It was further alleged that CCH's staff failed to provide necessary medical treatment to Carl for at least six hours before he was transported to T.J. Sampson Hospital in Glasgow. The Smiths alleged that during the six-hour delay, Carl suffered a disabling heart attack leaving him permanently disabled.

The Smiths asserted one count of negligence alleging CCH and its directors had a duty to Carl "to use due care of a medical facility examining, diagnosing, and treating" Carl. They alleged CCH and the Directors breached that duty by failing to provide adequate medical treatment in a timely manner and CCH's and the Directors' conduct was "below the standards of the medical profession" in the community.

On August 28, 2014, CCH filed a timely answer denying negligence or liability to the Smiths. On that same date, CCH served requests for admissions on the Smiths. In the requests, CCH asked the Smiths to admit or deny the following:

> No physician and/or health care professional has criticized the care and treatment Carl Smith received CCH as having deviated from the accepted standards of medical care.
>
> No physician and/or health care professional has advised Carl or Frances Smith, or anyone acting their behalf, that CCH's care and treatment caused any injury to Carl or Frances Smith.
>
> Carl and Frances Smith are unable to state through expert testimony that the treatment by CCH rendered to Carl Smith deviated from accepted standards of medical care.
>
> Carl and Frances Smith are unable to state through expert testimony that the care and treatment by CCH, to a reasonable degree of medical probability, caused any injury to either of them.

Pursuant to Kentucky Rules of Civil Procedure (CR) 36.01(2), the Smiths were required to serve a written answer or objection within 30 days or the matters in the requests were deemed admitted. The 30th day fell on a Saturday, so the Smiths' response deadline was Monday, September 29, 2014. That date passed with no response.

On October 13, 2014, the Smiths filed a motion for protective order. In a supportive memorandum, the Smiths acknowledged that "on or about August 28, 2014," they were served with CCH's request for admissions. The Smiths did not offer any justification for their failure to respond within 30 days but argued they were excused from responding because the requests were overly broad and unduly burdensome. The Smiths maintained they were not required to identify

potential witnesses with whom they discussed the allegations in the complaint. However, the Smiths did not request to withdraw their admissions. The Smiths' motion for protective order was noticed for a hearing on November 17, 2014.

Prior to the hearing date, CCH filed a voluntary petition for Chapter 11 bankruptcy relief and noticed the parties and the trial court on October 27, 2014. Unaffected by the automatic stay, the Directors filed a motion for summary judgment on November 7, 2014. In support, the Directors filed an affidavit attesting to the following:

1) They were not employees or officers of CCH;

2) With the exception of William Powell, they were neither physicians nor health care providers;

3) They did not perform a medical exam on Mr. Smith;

4) They made no diagnosis of Mr. Smith;

5) They provided no medical treatment to Mr. Smith;

6) They were not involved in Mr. Smith's medical care or any assessments or decisions related to Mr. Smith's medical care;

7) They were not asked to, nor did they, confer with Mr. Smith or Mrs. Smith, any other person on the Smith's behalf, or anyone involved in Mr. Smith's medical care with respect to Mr. Smith's admission and/or treatment received from CCH; and

8) They were not, to their knowledge, present in CCH's emergency room while Mr. Smith was being seen there.

On the date of the hearing on the Directors' motion, the Smiths argued their action against the Directors was actually one for "negligent hiring and retention." The Directors countered that the complaint only alleged medical negligence. The trial court took the matter under advisement allowing the Directors time to respond to the Smiths' argument.

Before the trial court ruled on the Directors' motion for summary judgment, the Smiths successfully sought relief from the automatic stay in bankruptcy court on March 16, 2015. On July 1, 2015, CCH filed a motion for summary judgment based on the Smiths' admission that they did not have an expert to support their malpractice claim.

On July 9, 2015, the trial court heard oral arguments on CCH's motion for summary judgment. At the hearing, after the trial court noted the Smiths' admissions regarding expert testimony, the Smiths conceded they had not conferred with any medical expert who could testify that CCH breached the standard of care and that such a breach caused injury. Based on that concession and the Smiths' failure to timely respond to CCH's request for admissions, the trial court granted CCH's motion for summary judgment. At that time, the trial court had not ruled on the Directors' motion for summary judgment.

On July 24, 2015, the Smiths filed a motion to alter, amend, or vacate the summary judgment in CCH's favor. While that motion was pending and with

no ruling on the Directors' motion for summary judgment, the Smiths filed a notice of appeal listing CCH and the Directors as appellees.

On August 13, 2015, the Smiths filed a motion in the trial court for withdrawal of requests for admissions deemed admitted arguing their failure to respond to the requests almost eleven months earlier was due to counsel's mistake and inadvertence. The motion was accompanied with an affidavit of their counsel stating that he "received [CCH's] Requests for Admissions via first-class United States mail on or about October 3, 2014." Counsel also stated that upon receipt of the requests for admissions, he timely filed a motion for protective order.

On August 21, 2015, the trial court granted the Directors' motion for summary judgment. This Court entered an order on November 4, 2015, holding the Smiths' appeal in abeyance to allow the trial court to rule on the pending motion to vacate CCH's summary judgment.

On February 16, 2016, the trial court denied the Smiths' motion to withdraw the deemed admissions, as well as the Smiths' motion to vacate CCH's summary judgment. On November 29, 2016, the Court returned this appeal to the active docket.

Our standard of review of a grant of 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 is proper when it appears that it would be impossible for the adverse party to produce evidence at trial warranting a judgment in its favor. *Id*. Once a party files a properly supported summary judgment motion, the nonmoving party "cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991).

When summary judgment is granted to a defendant in a medical malpractice case, our standard is the same as in all cases but the plaintiff's duty to come forth with evidence to defeat that motion is specific. Generally, to survive a motion for summary judgment, the plaintiff must produce expert evidence of "(1) the standard of skill expected of a reasonably competent medical practitioner and (2) that the alleged negligence proximately caused the injury." *Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky.App. 2006).

The Smiths failed to timely respond to CCH's requests for admissions. In those requests, the Smiths were asked to admit or deny that they could not produce expert testimony that CCH deviated from the standard of care in treating Carl and that CCH caused injury to the Smiths.

CR 36.01(2) states:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless,

> within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons upon him.

The failure to respond can be fatal to a plaintiff's claim or a defendant's defense.

As noted in *Harrid v. Stewarts*, 981 S.W.2d 122, 124 (Ky.App. 1998), a request for admissions is "an effective tool in pretrial practice and procedure" and one that a party is advised not to ignore. "[A]ny matter admitted under [CR 36.01] is held to be *conclusively established* unless the trial court permits the withdrawal or amendment of the admissions." *Id*.

A trial court may permit withdrawal of admissions when there is no showing of prejudice by the party that obtained the admission and "the presentation of the merits of the action will be subserved thereby[.]" CR 36.02. We review the trial court's decision under an abuse of discretion standard. *Buridi v. Leasing Grp. Pool II, LLC*, 447 S.W.3d 157, 174 (Ky.App. 2014).

Although the Smiths' counsel stated in his sworn affidavit that he did not receive the requests for admission until October 3, 2014, that statement is directly contradicted by the Smiths' motion for protective order stating that the

requests were served on August 28, 2014. Putting that inconsistency aside, we address the applicable law.

Prejudice under CR 36.02 does not exist because withdrawal of an admission early in the litigation may force the opposing party to engage in discovery and rework its summary judgment. *Id*. at 175-76. However, prejudice is only part of the equation. As the Court explained in *Buridi*:

> The trial court must also evaluate whether "the presentation of the merits of the action will be subserved" by withdrawal or amendment. It is with this part of the analysis that we have difficulty seeing how withdrawal of the matters deemed admitted would have done anything but delay the inevitable—a loss for Appellants.

Id. at 176. The trial court engaged in the proper analysis.

Notably, when the Smiths filed their motion to withdraw the admissions, eleven months elapsed since the filing of their complaint alleging medical malpractice, ample time to confer with an expert who could provide the necessary evidence to survive summary judgment. During the hearing on July 9, 2015, the Smiths' counsel was specifically asked by the trial court if the Smiths would be able to provide expert proof. Counsel responded that he was "attempting to schedule the deposition of Carl's treating physician" but did not provide any affidavits, report or medical record to suggest that the physician would provide any criticism of the care CCH provided or that Carl's outcome would have different had he been earlier transferred to T.J. Samson.

The Smiths had ample time prior to filing their motion to withdraw admissions to present expert evidence to support their medical malpractice claim. They did not do so and, therefore, there is no evidence that the withdrawal of the admissions would have allowed the Smiths to survive summary judgment.

The Smiths argue that even if it was admitted there was no expert who could support their medical malpractice claim, the facts alleged fall within a limited exception to that requirement. Expert medical testimony is not required when "'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." *Perkins v. Hausladen*, 828 S.W.2d 652, 655 (Ky. 1992) (quoting *Prosser and Keeton on Torts*, Sec. 39 (5th ed.1984)). The Smiths reliance on this limited exception is misplaced because there are no facts or circumstances from which negligence and causation can be inferred.

The gravamen of the Smiths' medical malpractice claim is CCH delayed transfer of Carl to T.J. Samson Hospital and the lack of treatment at CCH during the delay caused him to suffer a heart attack and be permanently disabled. This is not the fact situation where negligence and causation are within the common knowledge of any layperson. The common layperson would not know

what medical treatment should have been administered by CCH or what difference it would have made had Carl been earlier transferred to T.J. Samson. We reject the Smiths' contention that expert medical testimony was not required.

Contrary to the Smiths' assertion, the matters deemed admitted were not questions of law but admissions of fact or mixed law and fact. Responding to an argument based on similar requests, the Court in *Lewis v. Kenady*, 894 S.W.2d 619, 621 (Ky. 1994) stated: "In short, the admissions herein are what they are and the rule means what it says." If the Smiths found the requests objectionable on the basis that they called for conclusions of law, the remedy was to file a timely objection on that grounds, not ignore the requests.

The Smiths argue CCH waited too long in filing its motion for summary judgment and is precluded from reliance on the admissions by the doctrine of laches. "The basis of the doctrine of laches is that a court of equity will withhold relief if it would be inequitable to grant the demand. In its legal significance laches is not merely delay, but delay that results in injury or a disadvantage to the adverse party." *Card Creek Coal Co. v. Cline*, 305 Ky. 473, 475, 204 S.W.2d 571, 573 (1947). While a summary judgment should be denied where it is filed prematurely, *see Suter v. Mazyck*, 226 S.W.3d 837 (Ky.App. 2007), we decline to hold that a motion for summary judgment can be barred by laches. Foremost, laches is used as a defense against a claim. Moreover, there was

no prejudice by the delay when during that time, the Smiths could have found an expert to support their claim. Even with that time, the Smiths were unable to identify an expert.

We reject the Smiths' argument there was a due process violation when the trial court's granted summary judgment to CCH. The trial court conducted hearings on the matter and, ultimately, based its decision to grant CCH summary judgment because of the Smiths' failure to produce expert testimony. The summary judgment was not a discovery sanction but was properly granted based on the admissions and the Smiths' failure to produce expert testimony to support their medical malpractice claim.

The final issue is whether the trial court properly granted summary judgment to the Directors.[1] The Directors point out the Smiths confirmed during the prehearing conference that no issues regarding summary judgment to the Directors would be presented on appeal or include the August 21, 2015 order granting summary judgment in their prehearing statement. CR 76.03. We find there is a more compelling reason why review of the Smiths' argument that the Directors could be liable under a theory of negligent hiring and retention is precluded.

[1] In their reply brief, the Smiths suggest the trial judge was not sufficiently knowledgeable of medical malpractice law to decide the summary judgment motions. That suggestion is without any grounds and is disposed of without elaboration.

In opposition to the Directors' motion for summary judgment, the Smiths argued the Directors may be liable for negligent hiring and retention.[2] Even if applicable to this situation, a claim for negligent hiring and retention was not raised in the complaint and the Smiths never sought to amend that complaint pursuant to CR 15.01 to include that claim. As stated in *Davidson v. Com., Dep't of Military Affairs*, 152 S.W.3d 247, 253 (Ky.App. 2004), a plaintiff "may not escape summary judgment by raising allegations which he might have made in his complaint but did not."

The orders and summary judgments of the Clinton Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEES:
Frank Yates, Jr. Louisville, Kentucky	Timothy H. Napier Louisville, Kentucky

[2] The Smiths do not present any issue on appeal regarding the trial court's summary judgment on the issue of whether the Directors were jointly or individually liable for medical negligence. Any such argument would fail because as a threshold matter, they offered no affirmative evidence in opposition to the Directors' motion for summary judgment that any of the Directors provided any medical care to Carl.